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A TREATISE

ON

EXTRAORDINARY

LEGAL REMEDIES,

EMBRACING

MANDAMUS, QUO WARRANTO

AND

PROHIBITION.

By JAMES L. HIGH.

SECOND EDITION.

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PREFACE.

Since the publication of the first edition of this work in 1874 nearly eight hundred decisions have appeared upon the topics of which it treats. These decisions have been embodied in the present edition, and, while the plan and structure of the work remain unchanged, such additions to or modifications of the text have been made as to adapt it to the existing state of the law.

J. L. H.

Chicago, March, 1884.

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PART I.

THE LAW OF MANDAMUS

THE

LAW OF MANDAMUS.

CHAPTER I.

OF THE ORIGIN AND NATURE OF THE WRIT OF MANDAMUS.

§ 1. Definition of the writ.
2. Its ancient origin.
3. The writ a prerogative remedy in England.
4. Not a prerogative writ in the United States; judgment subject to review.
5. The writ regarded as an extraordinary remedy.
6. Comparison of mandamus and injunction.
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10. Conditions necessary to the exercise of the jurisdiction.
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12. Courts will not anticipate omission of duty.
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15. Not granted where other adequate legal remedy exists.
16. Statutory remedy a bar to mandamus.
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19. Absence of other remedy not always a ground for mandamus.
20. The jurisdiction as affected by equitable remedies.
21. Writ not granted where court of equity has acquired jurisdiction.
22. Qualification of the rule.
23. Injunction, when a bar to the relief.
24. Distinction between ministerial duties and those resting in discretion, the governing principle.

few instances of its application before the latter part of the seventeenth century, when it may be said to have been first systematically used as a corrective of official inaction, and for the purpose of setting in motion inferior tribunals and officers.[1]

§ 3. Originally the writ of mandamus was purely
* 6 a prerogative writ, and to this day it preserves in England some of its prerogative features. It was called a prerogative writ from the fact that it proceeded from the king himself, in his court of kings bench, superintend-

[1] Baggs' case, 11 Coke, 93, decided in Trinity Term, 13 Jac. I, has been frequently though incorrectly cited as the earliest case of a mandamus, at least to muncipal corporations. This was a case where the writ was granted to restore a member of a muncipal corporation to the enjoyment of his franchise, from which he had been improperly removed, but it is by no means the first case in which the jurisdiction was exercised for this purpose. See Middleton's case, 2 Dyer, 332, b. temp. 16 Eliz. And Powys, J., in Queen *v.* Heathcote, 10 Mod. 57, referring to the assertion that Baggs' case was the beginning of mandamus, says that the writ is certainly of much greater antiquity.

In Dr. Widdrington's case, 1 Lev. part I, 23, 13 Car. II, the antiquity of the writ is thus stated: "The court was moved for a mandamus to restore him to a fellowship in Christ's College in Cambridge, which was opposed by Jones, because the universities have conusance of pleas by their charter, and the colleges have their visitors; and therefore no mandamus lies. But two precedents were remembered to have been cited by Arthur Trevor in Dr. Godland's case, of mandamus granted in the like case, the one in the time of Edw. 2, and the other in the time of Edw. 3. To which Jones said that no mandamus had been granted since those till within these ten years. But Foster, Chief Justice, said that there was one about the end of Elizabeth's reign, or the beginning of King James'."

Still more satisfactory proof of the early origin of the jurisdiction by mandamus is found in Rex *v.* Askew, Burr. 2186, where Lord Mansfield says: "In a manuscript book of reports which I have seen the reporter cites (in reporting Dr. Bonham's case), a mandamus in the time of Edw. 3, directed to the University of Oxford, commanding them to restore a man that was *bannitus;* which shows both the antiquity and extent of this remedy by mandamus."

For early instances in which the writ was used to restore municipal officers to their corporate rights and franchises, see King *v.* City of Canterbury, 1 Lev. part I, 119; Sir Thomas Earle's case, Carth. 173; Rex *v.* Mayor of Oxford, 2 Salk. 428.

ing the police and preserving the peace of the realm, and it was granted where one was entitled to an office or function, and there was no other remedy.[1] BLACKSTONE terms it a "high prerogative writ, of a most extensive remedial nature,"[2] and it is uniformly referred to in the earlier cases as a prerogative remedy, and is spoken of as one of the flowers of the kings bench.[3] In this country, however, a mandamus can not in any strict sense be termed a prerogative writ, and much confusion of ideas has resulted from the efforts of many of the courts to attach prerogative features to the remedy, as used in the United States. This confusion has resulted chiefly from a failure to properly discriminate between the English and American systems. Under the English constitution, the king is the fountain and source of justice, and where the law did not afford a * 7 remedy by the regular forms of proceedings, the prerogative powers of the sovereign were invoked in aid of the ordinary judicial powers of the courts, and the mandamus was issued in the king's name, and by the court of kings bench only, as having a general supervisory power over all inferior jurisdictions and officers. Originally, too, the king sat in his own court in person and aided in the administration of justice, and although he has long since ceased to sit there in person, yet by a fiction of law he is still so far presumed to be present, as to enable the court to exercise its prerogative powers in the name and by the authority of the sovereign. And the fact that a mandamus was formerly allowed only in cases affecting the sovereign, or the interests of the public at large, lent additional weight to the prerogative theory of the writ. These suggestions are believed to sufficiently explain the statements so frequently met in the reports, that the writ of mandamus is a prerogative writ, issuing not of strict right, but at the will of the sovereign and as

[1] Per MANSFIELD, C. J., in King v. Barker, 1 Black. W. 352.

[2] 3 Black. Com. 110.

[3] Per DODERIDGE, J., in Awdley v. Joy. Poph. 176.

an attribute of sovereignty.[1] As confined to the English system, and to the jurisdiction of the court of kings bench, these statements may be accepted as correct. But even in that country there seems to be a growing tendency to divest the writ of its prerogative features, and to treat it in the nature of a writ of right.

§ 4. In the United States, from the nature of our system of government, the writ has necessarily been stripped of its prerogative features. Indeed, it is difficult to perceive how a mandamus can in any sense be deemed a prerogative writ in this country, unless the power of granting it were confined to one particular court in each state, or to a particular federal court, whose general functions should correspond to those of the court of kings bench, and which should represent the sovereignty of the country in the same sense in which it was represented in England by the kings bench. And the better considered doctrine now is, that the writ has, in the United States, lost its prerogative aspect, having come to be * 8 regarded much in the nature of an ordinary action between the parties, and as a writ of right to the extent to which the party aggrieved shows himself entitled to this particular species of relief.[2] In other words, it is regarded

[1] See Kendall v. The United States, 12 Pet. 527; Commonwealth v. Dennison, 24 How. 66; Gilman v. Bassett, 33 Conn. 298.

[2] Commonwealth v. Dennison, 24 How. 66; Kendall v. The United States, 12 Pet. 527; Gilman v. Bassett, 33 Conn. 298; Arberry v. Beavers, 6 Tex. 457; State v. Commissioners of Jefferson Co., 11 Kan. 66; Haymore v. Commissioners of Yadkin, 85 N. C. 268. In Commonwealth v. Dennison, 24 How. 66, TANEY, C. J., referring to the prerogative features of the writ, says: "It is equally well-settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused. But the right to the writ and the power to issue it have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable." So in Gilman v. Bassett, 33 Conn. 298, the court, BUTLER, J., say: "Doubtless the writ was originally a prerogative one, but it has

as in the nature of an action by the person in whose favor the writ is granted, for the enforcement of a right in cases where the law affords him no other adequate means of redress.[1] And a judgment in a mandamus proceeding, as in case of an ordinary action at law, is subject to review by writ of error or appeal upon like conditions as in other cases.[2]

§ 5. Under the American system the writ having, as we have thus seen, been stripped of its prerogative features, it has necessarily lost some of the characteristics which formerly distinguished it as an extraordinary writ, and has been assimilated to the nature of an ordinary remedy.[3] It is still, however, regarded as an extraordinary remedy in the sense that it is used only in extraordinary cases, and * 9 where the usual and ordinary modes of proceeding and forms of remedy are powerless to afford redress to the party aggrieved, and where without its aid there would be a failure of justice.[4] In this sense, its character as an extraordinary writ bears a striking resemblance to that of injunction,

ceased to depend upon any prerogative power, and is now regarded in much the same light as ordinary process."

The courts of Illinois, however, formerly adhered to the high prerogative theory of the writ, denying that it was in any sense a writ of right, and insisting that it issued only by virtue of prerogative, or in the discretion of the courts. See School Inspectors of Peoria v. The People, 20 Ill. 530; People v. Hatch, 33 Ill. 134, and see opinion of BREESE, J., p. 140; City of Ottawa v. The People, 48 Ill. 240. But under the statutes of Illinois, it is now held that the remedy is no longer a prerogative one, being an ordinary action at law in cases where it is appropriate, although the right to relief is still regarded as resting in the discretion of the court. People v. Weber, 86 Ill. 283. A tendency to the prerogative theory is also noticeable in New York, where it is held that, mandamus being a prerogative writ, the relator must take the benefit of it on such terms as are accorded by the sovereign. People v. Board of Metropolitan Police, 26 N. Y. 316.

[1] Arberry v. Beavers, 6 Tex. 457.

[2] Hartman v. Greenhow, 102 U. S. 672.

[3] See Commonwealth v. Dennison, 24 How. 66.

[4] Commonwealth v. Canal Commissioners, 2 Penrose & Watts (2nd edition), 517. And see Commonwealth v. Commissioners of Allegheney, 16 S. & R. 317; Commonwealth v. Commissioners of Philadelphia, 1 Whart. 1.

which is the principal extraordinary remedy of courts of equity, and is granted only when the usual and accustomed modes of redress are unavailing. And it is to be constantly borne in mind in investigating the law of mandamus as it now prevails both in England and the United States, that by treating the remedy as an extraordinary one, it is not to be understood that the writ is left to the arbitrary caprice of every court vested with the jurisdiction, or that its use is not governed by rules as fixed and principles as clearly defined as those which regulate any branch of our jurisprudence. On the contrary, it is believed that few branches of the law have been shaped into more symmetrical development, and few legal remedies are administered upon more clearly defined principles, than those which govern the courts in administering relief by the extraordinary aid of mandamus.

§ 6. A comparison of the writ of mandamus, as now used both in England and America, with the writ of injunction, discloses certain striking points of resemblance as well as of divergence in the two writs. Both are extraordinary remedies, the one the principal extraordinary remedy of courts of equity, the other of courts of law, and both are granted only in extraordinary cases, where otherwise these courts would be powerless to administer relief. Both, too, are dependent to a certain extent upon the exercise of a wise judicial discretion, and are not grantable as of absolute right in all cases. It is only when we come to consider the object and purpose of the two writs, that the most striking points of divergence are presented. An injunction is essentially a preventive remedy, mandamus a remedial one. The
* 10 former is usually employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and enforce inaction, those of a mandamus to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, mandamus as an active one. The former preserves matters *in statu quo*, while the very object of the latter is to

change the status of affairs and to substitute action for inactivity. The one is, therefore, a positive or remedial process, the other a negative or preventive one.[1] And since mandamus is in no sense a preventive remedy, it can not take the place of an injunction, and will not be employed to restrain or prevent an improper interference with the rights of relators.[2]

§ 7. An important feature of the writ of mandamus and one which distinguishes it from many other remedial writs, is that it is used merely to compel action and coerce the performance of a pre-existing duty. In no case does it have the effect of creating any new authority, or of conferring power which did not previously exist, its proper function being to set in motion and to compel action with reference to previously existing and clearly defined duties. It is therefore in no sense a creative remedy, and is only used to compel persons to act where it is their plain duty to act without its agency.[3] And it follows, necessarily, that the writ will not go to command the performance of an act which would be unauthorized or unlawful in the absence of the writ.[4]

§ 8. While in this country the writ has been regulated to a considerable extent by constitutional and statutory enactments, it has lost but few of its ancient remedial incidents, and is still governed by common-law rules where such rules have not been abrogated. Though in form and name the proceedings partake somewhat of a criminal nature, yet the remedy is

[1] See further as to the distinctions here noted, People *v.* Inspectors of State Prison, 4 Mich. 187; Attorney General *v.* New Jersey R. & T. Co. 2 Green Ch. 136; Washington University *v.* Green, 1 Md. Ch. 97; Sherman *v.* Clark, 4 Nev. 138; Blakemore *v.* Glamorganshire R. Co., 1 Myl. & K. 154; Crawford *v.* Carson, 35 Ark. 565.

[2] Legg *v.* Mayor of Annapolis, 42 Md. 203.

[3] People *v.* Gilmer, 5 Gilm. 242. And see opinion of BREESE, J., in People *v.* Hatch, 33 Ill. 140; Lowe *v.* Phelps, 14 Bush, 642; Tyler *v.* Taylor, 29 Grat. 765; Milliner's Adm'r *v.* Harrison, 32 Grat. 422. See also People *v.* Village of Crotty, 93 Ill. 180.

[4] Johnson *v.* Lucas, 11 Humph. 306; Cook *v.* Candee, 52 Ala. 109; State *v.* Commissioners, 57 Ala. 240; Polk *v.* Winett, 37 Iowa, 34; State *v.* Lewis, 35 N. J. L. 377; State *v.* Mayor of Newark, 35 N. J. L. 396.

in substance a civil one, having all the qualities and attributes of a civil action.[1] So much is it regarded as an ordi-
* 11 nary civil action that it is held to fall within a statute authorizing changes of venue in civil actions in law or equity.[2] And since the proceeding has all the elements of an ordinary action at law, including parties, pleadings, *mesne* and final process, it is regarded as an original proceeding or suit, rather than the mere final process in a suit, or a mode of obtaining execution on a judgment.[3]

§ 9. The writ of mandamus being justly regarded as one of the highest writs known to our system of jurisprudence, it only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. The right which it is sought to protect must therefore be clearly established, and the writ is never granted in doubtful cases.[4] And the person seeking the relief must show a

[1] State *v.* Bailey, 7 Iowa, 390; Judd *v.* Driver, 1 Kan. 455; State *v.* Gracey, 11 Nev. 223. And see McBane *v.* The People, 50 Ill. 503.

[2] City of Williamsport *v.* Commonwealth, 90 Pa. St. 498.

[3] McBane *v.* The People, 50 Ill. 503. "The proceeding by mandamus," says WALKER, J., "has all the elements of a suit. It has a party plaintiff, a party defendant, and is to obtain a right of which the plaintiff is deprived, and it is instituted and carried on in a court, and we are at a loss to determine what element it lacks to be a suit. It has *mesne* and final process, has pleadings, and issues of law and of fact are formed and tried as in other cases, and it terminates in a judgment which is executed in a mode prescribed by the law. This being so, it must be held to be an original proceeding, or suit, having none of the elements of final process."

[4] State *v.* Supervisors of Washington, 2 Chand. 250; Free Press Association *v.* Nichols, 45 Vt. 7; People *v.* Salomon, 46 Ill. 419; People *v.* Mayor of Chicago, 51 Ill. 28; Commissioners *v.* The People, 66 Ill. 339; Springfield & I. S. R. Co. *v.* County Clerk, 74 Ill. 27; People *v.* Trustees of Schools, 86 Ill. 613; People *v.* Town of Oldtown, 88 Ill. 202; State *v.* New Haven & N. Co. 45 Conn. 331; State Board of Education *v.* West Point, 50 Miss. 638; Sabine *v.* Rounds, 50 Vt. 74; Cook *v.* Town of Peacham, 50 Vt. 231; Tyler *v.* Taylor, 29 Grat. 765; Milliner's Adm'r *v.* Harrison, 32 Grat. 422; Townes *v.* Nichols, 73 Me. 515; Borough of Easton *v.* Lehigh Water Co. 97 Pa. St. 554; People *v.* Hatch, 33 Ill. 9; People *v.* Lieb, 85

clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced. The writ if granted must also be effectual as a remedy, and it must be within the power of the respondent as well as be his duty to do the act in question.[1] It follows also from the important position which this writ occupies as a remedial process, as well as from its nature as an extraordinary remedy, that the exercise of the jurisdiction rests, to a considerable extent, in the sound discretion of the court, subject always to the well-settled principles which have been established by the courts, or fixed by legislative enactment.[2] Cases may, therefore, arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise, judicial discretion, still refuse the relief. Thus, where by granting the writ the court would, in effect, decide questions of grave importance concerning the official

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Ill. 484; People v. Klokke, 92 Ill. 134; Butler v. Supervisors of Saginaw Co. 26 Mich. 22; People v. Auditor General, 36 Mich. 271; People v. Supervisors of Presque Isle Co. 36 Mich. 377. In State v. Supervisors of Washington, 2 Chand. 250, the court, JACKSON, J., say: "A writ of mandamus is the highest judicial writ known to our constitution and laws, and according to the long approved and well established authorities, only issues in cases where there is a specific legal right to be enforced, or where there is a positive duty to be and which can be performed, and where there is no other specific legal remedy. Where the legal right is doubtful, or where the performance of the duty rests in discretion, a writ of mandamus can not rightfully issue."

[1] People v. Hatch, 33 Ill. 9; People v. Lieb, 85 Ill. 484; People v. Klokke, 92 Ill. 134.

[2] Commonwealth v. Canal Commissioners, 2 Penrose & Watts (2nd edition), 517; Commonwealth v. Commissioners of Allegheney, 16 S. & R. 317; Commonwealth v. Commissioners of Philadelphia, 1 Whart. 1; People v. Hatch, 33 Ill. 134; People v. Curyea, 16 Ill. 547; People v. Illinois Central R. Co. 62 Ill. 510; People v. Ketchum, 72 Ill. 212; People v. Forquer, Breese, 68; Free Press Association v. Nichols, 45 Vt. 7; Belcher v. Treat, 61 Me. 577; Davis v. County Commissioners, 63 Me. 396; State v. Commissioners of Phillips Co. 26 Kan. 419; State v. Commissioners of Anderson Co. 28 Kan. 67; People v. Common Council of East Saginaw, 33 Mich. 164; People v. Genessee Circuit Judge, 37 Mich. 281; Sherburne v. Horne, 45 Mich. 160; Lamphere v. Grand Lodge, 47 Mich. 429.

status of parties not before the court, and who have had no opportunity of being heard, it may very properly refuse a mandamus, although the case presented is in other respects an appropriate case for the exercise of the jurisdiction.[1] So if another action is already pending in which the same questions may be tried, the court may, in its discretion, refuse a mandamus, especially where a determination of the questions upon a summary application for the writ would affect the rights of persons not before the court and who have had no opportunity of being heard.[2] Nor should the writ be
* 13 granted to compel a technical compliance with the strict letter of the law, in disregard of its real spirit.[3] It is not, however, to be understood that the discretion with which the courts are clothed in the exercise of this branch of their

[1] People v. Forquer, Breese, 68. "If the right had been established as a perfect legal right," says SMITH, J., p. 82, "and it has been violated, our laws must afford a remedy. But in the case of a mandamus, there are cases where this may have been shown, yet the court will not grant the writ. It is certainly a sound legal principle, that cases may arise where the court will not grant a mandamus, when the granting thereof will, in a collateral manner, decide questions of importance between persons who are not parties to the proceedings, and have had no notice and opportunity to interpose their defense; or where it will be attended with manifest hardships and difficulties. And it has been further decided in the court of kings bench, that courts are not bound to grant writs of mandamus in all cases where it may seem proper; but may exercise a discretionary power, as well in granting, as refusing, as where the end of it is merely a private right. See Bacon's Abridgment. Courts will not grant a mandamus to a person to do any act, where it is doubtful whether he ought to do it. The real question then, is, on this part of the case, that although it were certain the party applying had a legal right, and that it has been violated, and that the law would afford him a remedy, and which remedy is conceded to be a mandamus, whether it is not such a case as would be attended with manifest difficulties and great hardships, but also involving in a collateral manner the right of these parties who have no opportunity of defending their interests."

[2] Oakes v. Hill, 8 Pick. 47. And it is held that mandamus will not lie pending proceedings in certiorari as to the subject matter. Commissioners of Highways v. The People, 99 Ill. 587.

[3] State v. Commissioners of Phillips County, 26 Kan. 419.

jurisdiction is an arbitrary discretion; but, on the contrary, it is exercised under established rules of law and in accordance with well-settled principles.[1]

§ 10. Since the object of a mandamus is not to supersede legal remedies, but rather to supply the want of them, two prerequisites must exist to warrant a court in granting this extraordinary remedy: first, it must appear that the relator has a clear, legal right to the performance of a particular act or duty at the hands of the respondent; and, second, that the law affords no other adequate or specific remedy to secure the enforcement of the right and the performance of the duty which it is sought to coerce.[2] The test to be applied, therefore, in determining upon the right to relief by mandamus, is to inquire whether the party aggrieved has a clear, legal right, and whether he has any other adequate remedy, since the writ only belongs to those who have legal rights to enforce, who find themselves without an appropriate legal remedy.[3] In this sense mandamus may be regarded as a dernier resort, to be used when the law affords no other adequate means of relief.[4] And whenever the conditions above noticed co-exist, the right to the extraordinary aid of a mandamus may be regarded as, to that extent, *ex debito justitiæ*.[5] To warrant the relief, however, the right whose enforcement is sought

[1] Brooke *v.* Widdicombe, 39 Md. 386. In Wisconsin the somewhat novel doctrine has been asserted that the discretion of the courts in cases of mandamus is limited to cases where the relief is sought in aid of private rights. And where the writ is invoked in behalf of the state as a purely prerogative writ in matters *publici juris*, the courts have no discretion, and the writ must go in a proper case *ex debito justitiæ*. State *v.* Doyle, 40 Wis. 220.

[2] People *v.* Supervisors of Greene, 12 Barb. 27; Commonwealth *v.* Rossiter, 2 Binn. 360; People *v.* Thompson, 25 Barb. 73; Tarver *v.* Commissioner's Court, 17 Ala. 527; King *v.* Water Works Co. 6 Ad. & E. 355, per COLERIDGE, J.; People *v.* Commissioners of Highways, 88 Ill. 141; Cleveland *v.* Board of Finance, 39 N. J. L. 629; Speed *v.* Cocke, 57 Ala. 209; Murphy *v.* State, 59 Ala. 639.

[3] People *v.* Thompson, 25 Barb. 73; State *v.* Herron, 29 La. An. 848.

[4] People *v.* Head, 25 Ill. 325.

[5] People *v.* Hilliard, 29 Ill. 418

must be a complete and not merely an inchoate right.[1] And the relator must not only show a clear, legal right to have the particular thing in question done, but also the right to have it done by the persons against whom the writ is sought.[2] Nor will the relief be granted against a public officer to procure the performance of an act which is not imposed upon him as a duty by law.[3] And since the writ is founded on a suggestion of the relator's own right, it is not sufficient to show merely an absence or want of right on the part of * 14 respondents, without showing the relator's title.[4] Nor will the jurisdiction be exercised for the purpose of determining merely fanciful questions, in which the relators have no personal or pecuniary interest.[5]

§ 11. It is worthy of note that proceedings in mandamus do not always or necessarily determine the questions of ultimate right involved, and the writ is frequently granted when it can only determine one step in the progress of inquiry, and when it can not finally settle or determine the controversy. A familiar illustration of this may be found in cases of mandamus to canvassers of elections, to compel them to canvass the votes cast and to declare the return accordingly, where it may still be necessary to resort to proceedings in quo warranto to determine the ultimate questions of right and to procure admission to the office.[6]

§ 12. Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may

[1] People v. Corporation of Brooklyn, 1 Wend. 318. The court, SAVAGE, C. J., say: "A mandamus issues, in general, in all cases where the injured party has a right to have anything done, and has no other specific means of compelling its performance. There must be a right, therefore, without any other adequate remedy, or a mandamus does not issue; and I incline to the opinion that the right must be complete, not inchoate."

[2] People v. Mayor of Chicago, 51 Ill. 28; People v. Village of Crotty, 93 Ill. 180.

[3] State v. Van Winkle, 43 N. J. L. 579.

[4] Commonwealth v. County Commissioners, 5 Rawle, 75.

[5] People v. Masonic Benevolent Association, 98 Ill. 635.

[6] State v. County Judge of Marshall, 7 Iowa, 186.

be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is, therefore, incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act, and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed, nor does the law contemplate such a degree of diligence as the performance of a duty not yet due.[1]

§ 13. As regards the necessity of a previous demand and refusal to perform the act which it is sought to coerce by mandamus, the authorities are not altogether reconcilable. The better doctrine, however, seems to be that which recognizes a distinction between duties of a public nature, or those which affect the public at large, and duties of a merely private nature, affecting only the rights of individuals. * 15 And while in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by mandamus,[2] in the former class, the duty being strictly of a

[1] State v. Carney, 3 Kan. 88; Commissioners of Public Schools v. County Commissioners, 20 Md. 449. And see State v. Burbank, 22 La. An. 298; State v. Dubuclet, 24 La. An. 16; State v. Rising, 15 Nev. 164; State v. Board of County Commissioners, 17 Fla. 707. But see, *contra*, Mayor v. Dure, 59 Ga. 803; S. C. 60 Ga. 457. And in Attorney General v. Boston, 123 Mass. 460, it is held that where the officers against whom the writ is sought have clearly manifested a determination to disregard their duty by refusing to perform the act in question, the court is not obliged to wait until the evil is done before granting relief.

[2] Oroville & Virginia R. Co. v. Supervisors of Plumas, 37 Cal. 354; Jefferson Co. v. Arrghi, 51 Miss. 667; State v. Schaack, 28 Minn. 358. And see Lee County v. The State, 36 Ark. 276.

public nature, not affecting individual interests, and there being no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal.[1] In such cases the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal.[2] But in cases where demand and refusal are held necessary, it is not sufficient that the demand be couched in merely general terms, but it should be express and distinct, and should clearly designate the precise thing which is required.[3] So, too, the demand should be untrammeled by any conditions which may make the refusal a qualified instead of an absolute one.[4] And it should appear either that there has been a refusal in direct terms, or by such circumstances as clearly indicate an intention not to do the act required.[5] And a failure to allege the refusal has been held fatal to the application.[6] But in the case of public officers who have omitted to perform a duty enjoined upon them by law, an unreasonable delay in performance has been held equivalent to a refusal and sufficient to justify granting the relief.[7] And if the record clearly discloses an intention upon the part of respondents not to perform the act required, it is not necessary that a demand should have been made.[8]

§ 14. It is a fundamental principle of the law of mandamus, that the writ will never be granted in cases where, if issued, it would prove unavailing. And whenever it is apparent to the court that the object sought is impossible of

[1] State *v.* County Judge of Marshall, 7 Iowa, 186; State *v.* Bailey, Ib. 390; Commonwealth *v.* Commissioners of Allegheny, 37 Pa. St. 237; Attorney General *v.* Boston, 123 Mass. 460; Chumasero *v.* Potts, 2 Mont. 242. And see for a fuller discussion of the distinction here noticed, Chapter II, *post*.

[2] State *v.* County Judge of Marshall, 7 Iowa, 186. See also opinion of Mr. Justice FIELD in Virginia *v.* Rives, 100 U. S. 313.

[3] Chance *v.* Temple, 1 Iowa, 179.

[4] County Court of Macoupin *v.* The People, 58 Ill. 191.

[5] Coit *v.* Elliott, 28 Ark. 294.

[6] Douglas *v.* Town of Chatham, 41 Conn. 211.

[7] State *v.* Board of Finance, 38 N. J. L. 259.

[8] Palmer *v.* Stacy, 44 Iowa, 340.

attainment, either through want of power on the part of the persons against whom the extraordinary jurisdiction of the court is invoked, or for other sufficient causes, so that the granting of the writ must necessarily be fruitless, the court will refuse to interfere.[1] So if it is apparent that the writ, if granted, can not be enforced by the court, relief will be withheld, since the courts are averse to exercising * 16 their extraordinary jurisdiction in cases where their authority can not be vindicated by the enforcement of process.[2] Nor will mandamus be allowed unless the act or duty whose enforcement is sought is legally possible at the time, and it is therefore a sufficient return to an alternative mandamus that the respondent has no power to do the act required.[3] And the writ will not be granted where there is no necessity for the relief and where it would be ineffectual to aid the parties aggrieved.[4] So the relief will be withheld where the respondent offers to do the thing sought without a mandamus.[5] But it is important to observe, that while the impossibility of performing the act sought by the writ is ordinarily a sufficient objection to the exercise of the jurisdiction, yet it is otherwise where such impossibility has been caused by the respondent's own act, and in such case the courts may

[1] Williams *v.* County Commissioners, 35 Me. 345; Woodbury *v.* County Commissioners, 40 Me. 304; People *v.* The Chicago & Alton R. Co. 55 Ill. 95; People *v.* Supervisors of Westchester, 15 Barb. 607; Colonial Life Insurance Co. *v.* Supervisors of New York, 24 Barb. 166; People *v.* Tremain, 17 How. Pr. 142; State *v.* Trustees of Warren, 1 & 2 Ohio (2nd edition), 300; Universal Church *v.* Trustees, 6 Ohio, 445; State *v.* Perrine, 5 Vroom, 254; Bassett *v.* School Directors, 9 La. An. 513; Queen *v.* Norwich Savings Bank, 9 Ad. & E. 729; Cristman *v.* Peck, 90 Ill. 150; State *v.* Comptroller General, 4 Rich. N. S. 185; Smithee *v.* Mosely, 31 Ark. 425; O'Hara *v.* Powell, 80 N. C. 103; *In re* Bristol & N. S. R. Co. 3 Q. B. D. 10. See also *Ex parte* Du Bose, 54 Ala. 278; *Ex parte* Shaudies, 66 Ala. 134; State *v.* Bowden, 18 Fla. 17; State *v.* City of New Orleans, 34 La. An. 469.

[2] Bassett *v.* School Directors, 9 La. An. 513.

[3] State *v.* Perrine, 5 Vroom, 254.

[4] Taylor *v.* McPheters, 111 Mass. 351.

[5] Anon. Lofft, 148.

properly interfere, notwithstanding the alleged impossibility on the part of respondent to do the act in question.[1]

§ 15. From the origin, nature and purpose of the writ, as thus far discussed, it has been shown to be an extraordinary remedy, applicable only in cases where the usual and accustomed modes of procedure and forms of remedy are powerless to afford relief. It follows, therefore, from the principles already established, as well as from the very nature and essence of the remedy itself, that the writ never lies where the party aggrieved has another adequate remedy at law, by action or otherwise, through which he may attain the same result which he seeks by mandamus. This principle is of the highest importance in all cases where it is necessary to determine upon the propriety of interference by mandamus, and the rule will be found to be firmly established as one of the fundamental principles underlying the entire jurisdiction, that the existence of another specific, legal remedy, fully adequate to afford redress to the party aggrieved, presents a com-
* 17 plete bar to relief by the extraordinary aid of a mandamus. The rule has been recognized from the earliest times, and it has been applied throughout the entire growth and development of the law of mandamus. Indeed, it results from the very nature and origin of the writ, which was introduced to supplement the existing jurisdiction of the courts, and to afford relief in extraordinary cases where the law presented no adequate remedy. The existence or non-existence of an adequate and specific remedy at law in the ordinary forms of legal procedure is, therefore, one of the first questions to be determined in all applications for the writ of mandamus, and whenever it is found that such remedy exists, and that it is open to the party aggrieved, the courts uniformly refuse to interfere by the exercise of their extraordinary jurisdiction.[2]

[1] Queen *v.* Birmingham & Gloucester R. Co. 2 Ad. & E. N. S. 47.

[2] King *v.* Bank of England, Doug. 524; Wilkins *v.* Mitchell, 8 Salk. 229; Rex *v.* Bishop of Durham, Burr. 567; King *v.* Mayor of Col-

§ 16. While the rule under consideration is a common-law rule of very ancient origin, it is not confined in * 18 its application to cases where the existing remedy relied on in bar of the jurisdiction by mandamus is a common-law remedy, but applies with equal force to cases where a partic-

chester, 2 T. R. 260; Queen *v.* Hull & Selby R. Co. 6 Ad. & E. N. S. 70; Queen *v.* Derby, 7 Ad. & E. 419; Commonwealth *v.* Rosseter, 2 Binn. 360; Boyce *v.* Russell, 2 Cow. 444; People *v.* Hawkins, 46 N. Y. 9; State *v.* County Court of Howard, 39 Mo. 375; State *v.* McAuliffe, 48 Mo. 112; People *v.* Hatch, 33 Ill. 134; People *v.* Salomon, 46 Ill. 419; Louisville & New Albany R. Co. *v.* The State, 25 Ind. 177; Fogle *v.* Gregg, 26 Ind. 345; King William Justices *v.* Munday, 2 Leigh, 165; State *v.* Supervisors of Sheboygan, 29 Wis. 79; Shelby *v.* Hoffman, 7 Ohio St. 450; Reading *v.* Commonwealth, 11 Pa. St. 196; James *v.* Commissioners of Bucks Co. 13 Pa. St. 72; Heffner *v.* The Commonwealth, 28 Pa. St. 108; *Ex parte* Cheatham, 6 Ark. 437; *Ex parte* Williamson, 8 Ark. 424; Succession of Macarty, 2 La. An. 979; State *v.* Judge of Fourth District Court, 8 La. An. 92; State *v.* Judge of Sixth District Court, 9 La. An. 250; Leland *v.* Rose, 10 La. An. 415; State *v.* Judge of Sixth District Court, 12 La. An. 342; Early *v.* Mannix, 15 Cal. 149; People *v.* Hubbard, 22 Cal. 34; Peralta *v.* Adams, 2 Cal. 594; People *v.* Sexton, 24 Cal. 78; Byrne *v.* Harbison, 1 Mo. 225, 2nd edition, 160; State *v.* Engleman, 45 Mo. 27; St. Louis County Court *v.* Sparks, 10 Mo. 118; Mansfield *v.* Fuller, 50 Mo. 338; Ward *v.* County Court, Ib. 401; Commonwealth *v.* Commissioners of Allegheney, 16 S. & R. 317; People *v.* Supervisors of Chenango, 11 N. Y. 563; People *v.* Mayor of New York, 10 Wend. 393; *Ex parte* Lynch, 2 Hill, 45; People *v.* Thompson, 25 Barb. 73; People *v.* Wood, 35 Barb. 653; People *v.* Booth, 49 Barb. 31; State *v.* Gillespie, 9 Neb. 505; *Ex parte* Clements, 50 Ala. 459; Georges Creek C. & I. Co. *v.* County Commissioners, 59 Md. 255; State *v.* County Judge of Floyd, 5 Iowa, 380; Inhabitants of Lexington *v.* Mulliken, 7 Gray, 280.

Authorities might be multiplied indefinitely in support of the principle as stated in the text, but it is believed that the above will suffice. The principle will be found constantly recurring throughout these pages, especially in the chapters pertaining to Courts, Public Officers, and Private and Municipal Corporations. The principle is tersely stated by Mr. Justice YEATES, in Commonwealth *v.* Rosseter, 2 Binn. 360, in these words: "To found an application for a mandamus, the established rule of law is, that there ought in all cases to be a specific, legal right, as well as the want of a specific, legal remedy. Courts of justice uniformly refuse such applications where the party has another complete remedy, unless, as it is said in some cases the remedy be extremely tedious. It is evident that

ular or special remedy is provided by statute. Wherever, therefore, an express remedy is afforded by statute, plain and specific in its nature, and fully adequate to redress the grievance complained of, mandamus will not lie.[1] And the fact that the person aggrieved has, by neglecting to pursue his statutory remedy, placed himself in such a position that he can no longer avail himself of its benefit, does not remove the case from the application of the rule, and constitutes no ground for interference by mandamus.[2]

it would be highly inconvenient to try civil rights in this mode of procedure, when the party may institute a suit in the ordinary legal course, and if injured, obtain a complete satisfaction measured out to him by a jury, equivalent to a specific relief." And in Shelby *v.* Hoffman, 7 Ohio St. 450, the court use the following language: "The writ of mandamus, at common law, was a prerogative writ, introduced to prevent discord from a failure of justice, and to be used on occasions where the law had established no specific remedy. It is, however, a general rule at common law, that the writ of mandamus does not lie unless the party applying has no other adequate legal remedy."

[1] State *v.* Supervisors of Sheboygan, 29 Wis. 79; King William Justices *v.* Munday, 2 Leigh, 165; Louisville and New Albany R. Co. *v.* The State, 25 Ind. 177; Fogle *v.* Gregg, 26 Ind. 345; Marshall *v.* Sloan, 35 Iowa, 445; State *v.* Commissioners of Baltimore County, 46 Md. 621; *Ex parte* Mackey, 15 S. C. 322.

[2] State *v.* Supervisors of Sheboygan, 29 Wis. 79. This was an action by a former county treasurer to compel the board of supervisors to audit and allow certain portions of his official accounts which they had previously refused to allow. A statutory remedy existed by an appeal from the decision of the board to the circuit court of the county. The mandamus was refused, the court, COLE J., saying, p. 85: "Here was a plain, adequate remedy by action, furnished the relator for the correction of the decision of the board. The statute in the clearest language gave him an appeal to the circuit court from this determination disallowing those payments. This remedy the relator should have adopted, instead of applying for a mandamus to correct the erroneous decision of the board. True, his right to appeal from the decision of the board has expired, but that fact can make no difference with our determination on this application. He had a plain, legal remedy, but the fact that he has neglected to pursue it, and has now lost his right to appeal, constitutes no sufficient ground for granting a mandamus. If it did, then the writ should be granted in every case, to correct the erroneous decision of an inferior tribunal, when the aggrieved party has failed to

§ 17. It is to be borne in mind, however, in the application of the principle under discussion, that the * 19 existing legal remedy relied upon as a bar to interference by mandamus, must not only be an adequate remedy in the general sense of the term, but it must be specific and appropriate to the particular circumstances of the case. That is, it must be such a remedy as affords relief upon the very subject matter of the controversy, and if it is not adequate to afford the party aggrieved the particular right which the law accords him, mandamus will lie, notwithstanding the existence of such other remedy.[1] And if the existing remedy is inadequate to place the injured party in the position which he occupied before the injury or omission of duty complained of, it is insufficient for the purposes of the rule under discussion and will not prevent the interposition of the courts by mandamus.[2] Thus, the existence of a remedy by an action on the case against a public officer for neglect of official duty does not supersede the remedy by mandamus, since such an action can only afford pecuniary compensation and can not compel the performance of the specific duty required.[3] So the existence of a remedy by an action for damages for non-performance of the duty in question will not of itself prevent relief by mandamus.[4] And by a remedy at law such as will operate as a bar to mandamus is understood such a remedy as will enforce a right or the performance of a duty, and unless it reaches the end intended and actually compels a performance of the duty in question it is not an

appeal from such a decision within the time allowed by law. It must be apparent that the writ of mandamus has not been awarded for such a purpose, but only where no adequate, specific remedy by action exists."

[1] Etheridge *v.* Hall, 7 Port. 47; *In re* Trustees of Williamsburgh, 1 Barb. 34; Fremont *v.* Crippen, 10 Cal. 211; Babcock *v.* Goodrich, 47 Cal. 488; State *v.* Wright, 10 Nev. 167. See King *v.* Bank of England, Doug. 524.

[2] Etheridge *v.* Hall, 7 Port. 47.

[3] Fremont *v.* Crippen, 10 Cal. 211.

[4] Mobile & O. R. Co. *v.* Wisdom, 5 Heisk. 125.

adequate remedy within the meaning of the rule under discussion.[1]

§ 18. In conformity with the principle discussed in * 20 the preceding section, that the remedy relied upon as a bar to relief by mandamus must be specifically adapted to the precise injury for which redress is sought, it is well established that the existence of a remedy by indictment for the omission of duty or other grievance complained of, constitutes no objection to granting the extraordinary aid of a mandamus. An indictment, at the most, is merely punitive, and not remedial in its nature, and can only punish the neglect of duty, without compelling its performance. It can not, therefore, take the place or usurp the functions of a mandamus, which affords specific relief by commanding the performance of the identical thing sought.[2]

§ 19. While, as we have already seen, the rule that mandamus does not lie when the party aggrieved has another adequate and specific remedy at law, is well established and universally recognized, yet the converse of the proposition

[1] Overseers of Porter Township v. Overseers of Jersey Shore, 82 Pa. St. 275.

[2] Queen v. Eastern Counties R. Co. 10 Ad. & E. 531; King v. Severn & Wye R. Co. 2 Barn. & Ald. 644; People v. Mayor of New York, 10 Wend. 395; *In re* Trenton Water Power Co. Spencer, 659; Fremont v. Crippen, 10 Cal. 211. The principle is well stated by Lord DENMAN in Queen v. Eastern Counties R. Co. 10 Ad. & E. 531, as follows: "It was urged that our mandamus to compel obedience to an act of parliament implying a disobedience at present, the prosecutor may indict, and, having that remedy, does not require the extraordinary process of mandamus. This argument appears to prove too much, as it would prevent the court from acting in all cases where an act of parliament is contravened. Besides, the indictment does not compel the performance, but only punishes the neglect of duty, though it was thought proper to remind us that mandamus might do no more, for that disobedience would only bring the party into contempt, and expose them to attachment, which would but end in individual suffering, and leave the required act still undone. Yet we are not in the habit of supposing that persons required to obey the queen's writs issuing from this court will incur the penalty of contempt for contumacy, or be advised to evade the known and ancient process of the law."

does not necessarily hold true, and the absence or want of other adequate and specific legal remedy is not, of itself, sufficient to lay the foundation for interference by mandamus. Indeed, there are many cases where an injury has been committed or a duty omitted, for which the law affords no redress in the usual forms, and where the courts have yet refused to grant relief by mandamus.[1] But the fact that the form and * 21 method of proceeding by mandamus in a particular case are such as to prevent the judgment of the court from being revised by a writ of error, while it is a consideration which ought to induce great caution in assuming the exercise of the jurisdiction by mandamus, will not, of itself, prevent the court from interfering in a proper case.[2]

§ 20. The object of a mandamus being to enforce specific relief, it follows that it is the inadequacy rather than the absence of other legal remedies, coupled with the danger of a failure of justice without the aid of a mandamus, which must usually determine the propriety of this species of relief.[3] And the existence of possible equitable remedies does not affect the jurisdiction of courts of law by the writ of mandamus, for while such remedies may properly be taken into consideration in determining the exercise of judicial discretion in allowing the writ, they do not affect the question of jurisdiction.[4] Indeed, the courts have gone still farther, and have held that by a legal remedy, such as will bar relief by mandamus, is meant a remedy at law as distinguished

[1] *Ex parte* Ostrander, 1 Denio, 679; Lewis *v.* Barclay, 35 Cal. 213; *Ex parte* Newman, 14 Wal. 152. In *Ex parte* Ostrander, the court, JEWETT, J., say: "It is argued that without the aid of this writ the party is remediless: that error will not lie. That is not a sufficient ground in itself to entitle a party to the writ. It is true that when a party has another legal remedy, a mandamus will generally be refused on that ground; but it is not true that because a party has no legal remedy, unless by this writ, that it will be granted for that cause."

[2] Queen *v.* Eastern Counties R.Co. 10 Ad. & E. 531.

[3] People *v.* State Treasurer, 24 Mich. 468.

[4] People *v.* State Treasurer, 24 Mich. 468. And see People *v.* Mayor of New York, 19 Wend. 395.

from a remedy in equity, and that the mere existence of an equitable remedy is not, of itself, a conclusive objection to the exercise of the jurisdiction, although it may and should influence the court in the exercise of its discretion in the particular case.[1]

§ 21. Where, however, in addition to the existence of
* 22 a sufficient equitable remedy, the parties have already invoked the aid of that remedy and have sought relief in a court of equity, a different rule applies. In such cases, the parties having invoked the jurisdiction of a court of equity, if that court is fully empowered to determine the controversy and to afford ample relief to all parties in interest, a court of law will refuse to lend its extraordinary powers to determine a litigation which may be as well concluded in the forum in which it was originally begun. And the familiar principle of jurisprudence, that, as between courts of co-ordinate powers, the one which first acquires jurisdiction of a cause and is fully empowered to afford complete relief, shall be allowed to retain jurisdiction and determine the controversy, applies with especial force in such cases. The fact, therefore, that a court of chancery has already acquired jurisdiction of

[1] People *v.* Mayor of New York, 10 Wend. 395. And see Commonwealth *v.* Commissioners of Allegheny, 32 Pa. St. 218. In People *v.* Mayor of New York, Mr. Justice NELSON, for the court, says: "It is contended that a mandamus is not the appropriate remedy in this case. The proposition is, I believe, universally true, that the writ of mandamus will not lie in any case where another legal remedy exists, and it is used only to prevent a failure of justice. By legal remedy is meant a remedy at law, and though the party might seek redress in chancery, that, of itself, is not a conclusive objection to the application. That may and should influence the court in the exercise of the discretion which they possess, granting the writ under the facts and circumstances of the particular case, but does not affect its right or jurisdiction. Nor does the fact that the party is liable to indictment and punishment for his omission to do the act, to compel a performance of which this writ is sought, constitute any objection to the granting of the writ. The principle which seems to lie at the foundation of applications for this writ and the use of it is, that whenever a *legal right* exists, the party is entitled to a *legal remedy*, and when all others fail the aid of this may be invoked."

the same subject-matter which is presented in the application for a mandamus, and has full power to grant relief, or to compel the performance of the thing sought, is a complete bar to the exercise of the jurisdiction by mandamus.[1] Especially is this true where the relator in the mandamus proceedings is also the plaintiff in equity and has himself invoked the aid of that court. In such case, having voluntarily chosen the forum in which to litigate his * 23 rights, he is estopped by his own conduct from afterward seeking to transfer the controversy to another jurisdiction.[2]

[1] Queen *v.* Pitt, 10 Ad. & E. 272; People *v.* Warfield, 20 Ill. 160; People *v.* Wiant, 43 Ill. 268; People *v.* City of Chicago, 53 Ill. 424; School Inspectors of Peoria *v.* The People, 20 Ill. 530; Hardcastle *v.* Maryland & Delaware R. Co. 32 Md. 32; King *v.* Wheeler, Lee's Ca. temp. H. 99.

[2] People *v.* City of Chicago, 53 Ill. 424; School Inspectors of Peoria *v.* The People, 20 Ill. 530; Hardcastle *v.* Maryland & Delaware R. Co. 32 Md. 32. People *v.* City of Chicago, was an application on the relation of a newspaper company for a writ of mandamus to compel the common council of the City of Chicago to designate the newspaper published by said company as the official paper in which the proceedings of the council should be published, in conformity with a statute requiring their publication in the German newspaper having the largest circulation. It appeared in the proceedings that at the time of filing the petition for the alternative mandamus, a bill in chancery was already pending, in which the relators sought equitable relief for the same grievances. The alternative writ was denied, the court saying, p. 427: "It is made to appear to the court, in this proceeding, that at the time of filing the petition of the relators for the alternative writ of mandamus, there was pending in the circuit court of Cook County a suit in chancery, instituted by these relators against the common council of the city of Chicago, the various other city officers, and the company who publish the 'Illinois Volks Zeitung,' the German newspaper alleged to have been designated by the common council to publish its proceedings. The relators sought, by the bill in that suit, and obtained an injunction, restraining the city authorities and the 'Volks Zeitung' from executing the purpose for which the latter had been so designated, and the relators, in their bill, pray for 'such other relief as is agreeable to equity.' That bill is made an exhibit in the petition of the relators, and a copy is filed therewith."

"While there may be grave doubts whether a court of chancery would take jurisdiction for the mere purpose of compelling the proper exe-

§ 22. The rule as thus stated is to be accepted with the
* 24 qualification that the proceeding in chancery will afford as effectual a remedy as that by mandamus. And where the court is satisfied, from the nature of the questions involved, that they can not be appropriately or finally determined in the chancery proceeding, and that complete justice to all parties can not be had in that suit, or that it will be no bar to a subsequent suit of the same nature against the same defendants, the pendency of the proceeding in equity will not prevent the court from exercising its jurisdiction by mandamus, since the latter remedy affords more complete justice in such a case than could otherwise be obtained.[1]

§ 23. It has already been shown that mandamus never lies when the writ, if granted, would prove inoperative. And the rule is well established that the writ will not be granted to compel the performance of an act which has been expressly forbidden by an injunction in the same court or in another court of competent jurisdiction, or whose performance would be in direct violation of an existing injunction, even though the person seeking relief by mandamus is not a party to the injunction suit. Courts will not compel parties to perform acts which would subject them to punishment, or which would put them in conflict with the order or writ of another court,

cution of the law in question, on the part of the common council, yet, having acquired jurisdiction for a purpose clearly within the province of a court of chancery, that of awarding an injunction, it may retain the bill for the purpose of ascertaining and enforcing all the rights of the parties properly involved in the subject-matter in controversy. The writ of mandamus is only employed where the party has a legal right and has no other remedy. The relators, then, having resorted to a court of chancery in such manner as gives to that court full jurisdiction to adjust and enforce the rights of all the parties interested in this controversy, it would be improper for us, on this application, to undertake to settle the questions involved in that suit, in the mode desired. People *ex rel.* Mitchell *v.* Warfield, 20 Ill. 164; School Inspectors of Peoria *v.* The People *ex rel.* Grove, Ib. 531; People *ex rel.* Wallace *v.* Salomon, 46 Ill. 419; People *ex rel.* Wheaton *v.* Wiant, 48 Ill. 264. The alternative writ is denied."

[1] People *v.* Salomon, 51 Ill. 55.

nor will the court, in such cases, to which application is made for a mandamus, inquire into the propriety of the injunction.[1] And when it appears by the record that the respondent is already enjoined in the same court from performing the act sought, and that the injunction suit will determine the question involved, a mandamus will not be granted.[2] Where, however, the court granting the mandamus has first acquired jurisdiction of the subject-matter, it will not permit its jurisdiction to be ousted by the subsequent granting of an injunc-

[1] Ohio & Indiana R. Co. *v.* Commissioners of Wyandot, 7 Ohio St. 278; State *v.* Kispert, 21 Wis. 387; *Ex parte* Fleming, 4 Hill, 581. And see People *v.* Warfield, 20 Ill. 160. But see, *contra*, State *v.* Dubuclet, 26 La. An. 127. Ohio & Indiana R. Co. *v.* Commissioners of Wyandot, 7 Ohio St. 278, was an alternative writ of mandamus to compel the county commissioners to subscribe to the stock of relator, in conformity with a vote of the electors of the county. The return of the commissioners alleged that a final decree had been rendered against them in a chancery suit instituted by certain citizens of the county, in which they had been perpetually enjoined from making the subscription. The peremptory mandamus was refused, the court, BRINKERHOFF, J., saying: * * * "It is true the Ohio and Indiana Railroad Company was not a party to the proceeding in chancery in which the decree of injunction was rendered, and that decree does not, therefore, bind or conclude the company by any of its findings; but it does, nevertheless have the effect, while it exists in full force, to preclude the company from having the peculiar remedy which it now here seeks. If we were to award the peremptory writ of mandamus, we should command the commissioners of Wyandot county to do the very act which, by our decree of injunction in full force, they are forbidden to do. The idea of such inconsistency is wholly inadmissible. If the peremptory writ of mandamus were to issue, and the defendants failed to obey it, they would be liable to process for contempt; while, on the other hand, if they obeyed it, they would be equally in contempt for disobedience to the decree of injunction. Even where the order or decree of injunction is made by a court of competent jurisdiction, other than that in which the mandamus is sought, the latter will not thus place a party between two fires, by subjecting him to contradictory orders. *Ex parte* Fleming, 4 Hill, 581. Whether there be any way in which the Ohio and Indiana Railroad Company can get rid of the decree of injunction, is a question not before us. As to that, it is at liberty to proceed as it may be advised; but we are clear that it can not be done collaterally in this proceeding."

[2] People *v.* Hake, 81 Ill. 510.

tion by another court, restraining the respondent from doing the act in question. And in such case, the court granting the mandamus will exact obedience to its mandate, notwithstanding the granting of the injunction.[1]

§ 24. But the most important principle to be observed in the exercise of the jurisdiction by mandamus, and one
* 25 which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the distinction between duties of a peremptory or mandatory nature, and those which are discretionary in their character, involving the exercise of some degree of judgment on the part of the officer or body against whom the mandamus is sought. This distinction may be said to be the key to the extended system of rules and precedents forming the law of mandamus, and few cases of applications for this extraordinary remedy occur which are not subjected to the test of this rule. Stated in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but that as to all acts or duties necessarily calling for the exercise of judgment and discretion, on the part of the officer or body at whose hands their performance is required, mandamus will not lie. The application of the rule is universal and its illustrations are as multiform as are applications for the aid of this extraordinary remedy. It applies with especial force to cases where the aid of mandamus is sought against inferior courts or judges, public officers,
* 26 municipal authorities and corporate officers generally, and in all these cases it is the determining principle in guiding the courts to a correct decision. And whenever such officers or bodies are vested with discretionary power as to the performance of any duty required at their hands, or where in reaching a given result of official action they are necessarily

[1] Cumberland & Ohio R. Co. v. Judge of Washington County Court, 10 Bush. 564.

obliged to use some degree of judgment and discretion, while mandamus will lie to set them in motion and to compel action upon the matters in controversy, it will in no manner interfere with the exercise of such discretion, nor control or dictate the judgment or decision which shall be reached. But if, upon the other hand, a clear and specific duty is positively required by law of any officer, and the duty is of a ministerial nature, involving no element of discretion and no exercise of official judgment, mandamus is the appropriate remedy to compel its performance, in the absence of any other adequate and specific means of relief, and the jurisdiction is liberally exercised in all such cases.[1]

§ 25. From the nature of the remedy as thus far disclosed, it is obvious that it relates only to the enforcement * 27

[1] Humboldt Co. *v.* County Commissioners of Churchill, 6 Nev. 30; *Ex parte* Black, 1 Ohio St. 30; City of Ottawa *v.* The People, 48 Ill. 240; United States *v.* Seaman, 17 How. 225; United States *v.* The Commissioner, 5 Wal. 563; Secretary *v.* McGarrahan, 9 Wal. 298; State *v.* Board of Liquidators, 23 La. An. 388; State *v.* Shaw, Ib. 790; People *v.* Collins, 19 Wend. 56; People *v.* Attorney General, 22 Barb. 114; People *v.* Brennan, 39 Barb. 651; Freeman *v.* Selectmen of New Haven, 34 Conn. 406; State *v.* Robinson, 1 Kan. 188; Swan *v.* Gray, 44 Miss. 393; People *v.* Adam, 3 Mich. 427; Howland *v.* Eldredge, 43 N. Y. 457; Judges of Oneida Common Pleas *v.* The People, 18 Wend. 79; *Ex parte* Bacon and Lyon, 6 Cow. 392; *Ex parte* Benson, 7 Cow. 363; People *v.* New York Common Pleas, 19 Wend. 113; People *v.* Judges of Oneida Common Pleas, 21 Wend. 20; *Ex parte* Davenport 6 Pet. 661; United States *v.* Lawrence, 3 Dall. 42; *Ex parte* Poultney, 12 Pet. 472; Postmaster General *v.* Trigg, 11 Pet. 173; *Ex parte* Many, 14 How. 24; People *v.* Sexton, 37 Cal. 532; Barksdale *v.* Cobb, 16 Geo. 13; *Ex parte* Banks, 28 Ala. 28; King *v.* Justices of Cambridgeshire, 1 Dow. & Ry. 325; Queen *v.* Harland, 8 Ad. & E. 826; Queen *v.* Old Hall, 10 Ad. & E. 248; Kendall *v.* The United States, 12 Pet. 524; Citizen's Bank of Steubenville *v.* Wright, 6 Ohio St. 318; People *v.* Collins, 7 Johns. Rep. 549; State *v.* Secretary of State, 33 Mo. 293; *Ex parte* Selma & Gulf R. Co. 46 Ala. 423.

Space will not permit of further citation of authorities, and the above are selected from among the leading cases in which the doctrine of the text has been recognized and applied. For applications of the principle to courts, public officers, private corporations and municipal corporations, see the chapters on those subjects, *post.*

of duties incumbent by law upon the person or body against whom the coercive power of the court is invoked. It is not, therefore, an appropriate remedy for the enforcement of contract rights of a private or personal nature, and obligations which rest wholly upon contract, and which involve no question of trust or of official duty, can not be enforced by mandamus. A contrary doctrine would necessarily have the effect of substituting the writ of mandamus in place of a decree for specific performance, and the courts have, therefore, steadily refused to extend the jurisdiction into the domain of contract rights.[1] And since the writ is not granted *ex debito justitiæ* upon the assertion of a right, if it is apparent to the court that the rights of the parties are dependent upon a contract which is then the subject of proceedings in chancery for specific performance, in which the entire matter may be determined, a mandamus will not be granted.[2] Nor is the remedy appropriate to command the performance of a duty at the hands of one who does not occupy an official or quasi-official relation, and it will therefore be refused against the executor of the estate of a deceased person.[3]

§ 26. It is important that a person seeking the aid of a mandamus for the enforcement of his rights should come into court with clean hands, and where the proceedings have been tainted with fraud and corruption, the relief will be denied, however meritorious the application may be on other grounds.[4] So if the granting of the writ would have the effect of encouraging petty litigation and of delaying other and more important interests, sufficient grounds are presented to justify the court in withholding the relief.[5]

[1] State *v.* Zanesville Turnpike Co. 16 Ohio St. 308; Benson *v.* Paull, 6 El. & Bl. 273; State *v.* County Court of Howard, 39 Mo. 375; Parrott *v.* City of Bridgeport, 44 Conn. 180; State *v.* Republican River Bridge Co. 20 Kan. 404; Bailey *v.* Oviatt, 46 Vt. 627.

[2] King *v.* Wheeler, Lee's Ca. temp. H. 99.

[3] State *v.* Tolle, 71 Mo. 645.

[4] Commonwealth *v.* Henry, 49 Pa. St. 530.

[5] People *v.* Hatch, 33 Ill. 134, opinion of WALKER, J.

§ 27. The granting of the writ of mandamus is the exercise of an original and not of an appellate jurisdiction, the writ itself being an original process. Hence it follows that in those states where the courts of last resort are devoid of original jurisdiction and vested with only appellate * 28 powers, such courts can not exercise jurisdiction by mandamus.[1] An exception, however, is recognized where the issuing of the writ is necessary in aid of the appellate powers of such courts, and in such cases it is not regarded as an original proceeding, but one instituted in aid of the appellate jurisdiction possessed by the courts.[2]

§ 28. In England, the jurisdiction by mandamus, as we have seen, was formerly exercised exclusively by the court of kings bench, the writ being regarded as a branch of the king's prerogative, and therefore granted only by his own court, in which by legal fiction he was supposed always to be present. By the common-law procedure act of 1854,[3] however, the law of mandamus and the practice and procedure in administering the relief were entirely revolutionized. This act extended the jurisdiction to all the superior courts in the kingdom, which were authorized to grant the relief in connection with any civil action, save ejectment and replevin, the pleadings, practice and procedure therein being assimilated as closely as possible to those prescribed in ordinary civil actions for the recovery of damages. The effect of this sweeping enactment has been to place mandamus proceedings upon much the same footing as ordinary personal actions, and although the statute expressly preserves the jurisdiction of the kings bench as formerly exercised, its necessary result would seem to be the almost total annihilation of the prerogative features of the remedy, reducing it to a personal action for the

[1] Howell v. Crutchfield, Hemp. 99; Morgan v. The Register, Hardin (2nd edition), 618; Daniel v. County Court of Warren, 1 Bibb, 496.

[2] United States v. Commissioners of Dubuque, Morris, 42.

[3] 17 & 18 Victoria, Chap. 125. See Appendix, C.

protection of individual rights.[1] But, although the act entitles the plaintiff to demand a writ of mandamus, requiring the defendant to fulfill any duty in which the plaintiff is personally interested, either together with or separately from any other demand which may be enforced in the action, the right of the plaintiff to the aid of a mandamus is regarded as a substantive right in and of itself, and not a mere adjunct to the action already begun.[2] It is held, however, that
* 29 the act has not extended the remedy to the enforcement of merely private and personal contracts, such for example as an agreement between two parties to execute a lease, and as to all such contracts the party aggrieved is still left to pursue the ordinary legal remedies.[3]

§ 28 *a*. By the English Supreme Court of Judicature Act of 1873, the use of the remedy was still further enlarged and the procedure simplified. That act provides that a mandamus may be granted by an interlocutory order in all cases in which it shall appear to the court to be just or convenient that such order should be made. And the order may be made, either unconditionally, or upon such terms and conditions as the court shall think just.[4]

§ 29. In the United States, the jurisdiction by mandamus is usually exercised by the courts of general common-law jurisdiction throughout the different states. It is also exercised by the courts of last resort in many of the states, sometimes as a part of their original jurisdiction, fixed by the organic law of the state, and in other cases only in aid of their appellate powers. In the federal courts the writ is granted only in aid of an existing jurisdiction, and when necessary to the exercise of powers already conferred by law. And while it is doubtless competent for congress to confer upon the circuit and district courts of the United States the

[1] See Appendix, C.

[2] Fotherby *v.* Metropolitan R. Co. 15 L. T. R. N. S. 243.

[3] Benson *v.* Paull, 6 El. & Bl. 273.

[4] 36 & 37 Victoria, Chap. 66, § 25, Subdivision 8.

power of granting writs of mandamus as an original jurisdiction, such power has never yet been conferred, and these courts are strictly limited in the use of this extraordinary remedy to cases where it is necessary in aid of a jurisdiction already acquired.[1]

§ 30. Many of the states of this country have regulated the use of this remedy, to a considerable extent, by statute, but the tendency of the courts seems to be to adhere to the well-established rules of the common law governing the jurisdiction in all cases where these rules are applicable. In illustration of this tendency, where it is enacted by statute that the writ shall issue to "any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting * 30 from an office, or trust, or station; or to compel the admission of a party to the use or enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, officer, board or person," and it is also provided by the same statute that the writ "shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law," the courts will construe the latter section as a limitation upon the powers conferred by the former, and not as an enlargement of those powers. And the presumption will be indulged in such case that the legislature of the state, in prescribing this statutory remedy, had in view the nature and extent of the remedy by mandamus as known at the common law, and as used in other states of the union. The courts

[1] See Bath County v. Amy, 4 Chicago Legal News, 209, 13 Wal. 244; McIntyre v. Wood, 7 Cranch, 504; Graham v. Norton, 15 Wal. 427; Marbury v. Madison, 1 Cranch, 49; United States v. Smallwood, 1 Chicago Legal News, 321, decided in U. S. District Court for Louisiana. But by an act of congress approved March 3, 1873, it was provided that the proper circuit court of the United States should have jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railway Company to operate its road as required by law. 17 Statutes at Large, 509.

will, therefore, in administering relief by mandamus under such a statute, be governed by the same conditions and limitations which prevailed at common law, and will not issue the writ in cases where another adequate remedy is provided by law.[1]

§ 30 *a*. When the legislature of a state is invested by the constitution with plenary legislative power, it may enact that the writ of mandamus shall not issue in a given class of cases, as to compel the receipt for taxes of the bills of a state bank. And such legislation is held to be constitutional, notwithstanding the constitution expressly confers upon the supreme court of the state original jurisdiction in mandamus. Nor does the taking away of the remedy in such case impair the obligation of the contract between the state and the holders of the bills of such state bank, the right to a particular remedy not being an absolute and unqualified right to which the citizen is entitled.[2]

§ 30 *b*. The authorities are somewhat conflicting upon the question whether proceedings in mandamus fall within the statutes of limitation governing ordinary actions against the same persons, or concerning the same rights. Upon the one hand, it is held that the statutes of limitation governing the subject-matter or right in question apply to proceedings in mandamus to enforce such right.[3] Upon the other hand, it is held that the statutes of limitation governing ordinary actions do not apply to a proceeding in mandamus, since it is an extraordinary remedy, to be employed only in the absence of other adequate and specific means of relief.[4] Where, however, the relator has slept upon his rights for an unreasonable time, the relief may be refused,[5] especially when the

[1] Kimball *v.* Union Water Company, 44 Cal. 173.

[2] State *v.* Gaillard, 11 S. C. 309.

[3] Auditor *v.* Halbert, 78 Ky. 577; Prescott *v.* Gonser, 34 Iowa, 175; Board of Supervisors *v.* Gordon, 82 Ill. 435.

[4] Chinn *v.* Trustees, 32 Ohio St. 236; Territory *v.* Potts, 3 Mont. 364; State *v.* Kirby, 17 S. C. 563.

[5] State *v.* Kirby, 17 S. C. 563.

delay has been prejudicial to the rights of the respondent.[1] And in refusing relief because of delay, the court may take into consideration the statute of limitations in analogous civil actions.[2] But in determining whether there has been such laches as to bar relief regard should be had to the circumstances of the case and to the nature of the relief sought, as well as to the question whether the rights of the respondents or of other persons have been prejudiced by such delay.[3]

§ 30 *c*. The right of trial by jury in proceedings in mandamus is generally determined by constitutional or statutory enactments in the different states. In Connecticut, it is held that the constitutional provision for jury trials has no application to proceedings in mandamus, and that when issues of fact are raised by the pleadings they are to be tried by the court without a jury.[4] And under the civil practice act of Montana, it is held that a proceeding in mandamus not being an ordinary action at common law, the relator is not entitled as a matter of right to a trial by jury, and that it rests in the sound discretion of the court to award such trial.[5]

§ 30 *d*. Where, upon a full hearing, an alternative writ of mandamus is dismissed upon the ground that the relator is not entitled to relief, the judgment of the court, being upon the merits, is a bar to a subsequent proceeding by mandamus to enforce the same right. The appropriate remedy for the party aggrieved in such case is by appeal and not by renewing the same application in another court.[6]

[1] Chinn *v.* Trustees, 32 Ohio St. 236.

[2] Territory *v.* Potts, 8 Mont. 364; George's Creek C. & I. Co. *v.* County Commissioners, 59 Md. 255.

[3] People *v.* Common Council of Syracuse, 78 N. Y. 56.

[4] Castle *v.* Lawlor, 47 Conn. 340.

[5] Chumasero *v.* Potts, 2 Mont. 242.

[6] State *v.* Hard, 25 Minn. 460.

CHAPTER II.

OF MANDAMUS TO PUBLIC OFFICERS.

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I. Nature and Grounds of the Jurisdiction.

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§ 31. The most important branch of the jurisdiction by mandamus is that which pertains to the writ as a * 32 remedy for the inaction or misconduct of public officers, charged with the performance of duties of a public nature, and the writ is most frequently granted to set in motion such officers and to compel their action in cases where they have refused or neglected the performance of their official duties. In the chapters upon private and municipal corporations [1] will be found a full discussion of the law of mandamus as applicable to corporate officers, while in the chapter upon courts the author has endeavored to state fully and in detail the principles governing the relief when applied as a corrective of inaction on the part of judicial officers. It is proposed in the present chapter to lay down the more general rules governing relief by mandamus as applicable to all public officers, and then to proceed with a discussion of the law of mandamus as affecting the title and possession of the office, with further discussion of the principles governing the use of the writ as a corrective of inaction on the part of ministerial, executive and legislative officers.

§ 32. It is to be premised that the jurisdiction by mandamus over the official acts of public officers, is exercised for the purpose of stimulating rather than of restraining their action. And while officers who are backward or dilatory in the exercise of their functions may properly be set in motion by mandamus, yet when they are once in motion and are proceeding to discharge a duty imposed upon them by law, they are no longer subject to the control of the writ.[2] With this distinction kept in view, it may be stated generally that where the law enjoins upon a public officer the performance of a specific act or duty, obedience to the law may, in the absence of other adequate remedy, be enforced by mandamus.[3] It is to be observed, however, that the writ neither

[1] See *post*, Chapters IV and V.

[2] School Directors *v.* Anderson, 45 Pa. St. 388; State *v.* West, 26 La. An. 322.

[3] United States *v.* Commissioners of Dubuque, Morris, 42; Freeholders

creates nor confers power upon the officer to whom it is directed, but merely commands the exercise of powers already existing. It will not, therefore, lie to compel an officer * 33 to perform an act which without the mandate of the court, it would be unlawful for him to perform.[1] And to warrant a court in granting the writ against a public officer, such a state of facts must be presented as to show that the relator has a clear right to the performance of the thing demanded, and that a corresponding duty rests upon the officer to perform that particular thing.[2] And where substantial doubt exists as to the duty whose performance it is sought to coerce, or as to the right or power of the officer to perform the duty, the relief will be withheld, since the granting of the writ in such case would render the process of the court nugatory.[3] So the fact that there are such difficulties in the way of performing the duty in question as to render the writ nugatory, if granted, is a sufficient objection to the exercise of the jurisdiction.[4] Indeed, the proposition is clearly and indisputably established, that mandamus will never lie to command the performance of an act which it is impossible for the officer to perform.[5]

§ 33. It is, of course, essential to the granting of the writ as against public officers, that the relator on whose application the relief is sought, should show some personal interest whose protection he seeks to enforce. And it may be stated as a general principle, that mandamus will not lie to compel action upon the part of public officers, where it is apparent that the relator has no direct interest in the action sought to be coerced, and that no benefit can accrue to him from its

v. Township of Lacey, 42 N. J. L. 536; State v. Runyon, 42 N. J. L. 568.

[1] Johnson v. Lucas, 11 Humph. 306; United States v. County of Clark, 95 U. S. 769; United States v. Labette County, 2 McCrary, 25.

[2] Houston etc. R. Co. v. Randolph, 24 Tex. 317; Tyler v. Taylor, 29 Grat. 765; State v. Grubb, 85 Ind. 213; State v. Taylor, 59 Md. 338.

[3] Williams v. Smith, 6 Cal. 91; People v. Forquer, Breese, 68.

[4] State v. Lehre, 7 Rich. 234.

[5] Ackerman v. Desha County, 27 Ark. 457.

performance.[1] To authorize the relief, therefore, it must clearly appear that there is a specific ministerial duty, in the performance of which the applicant for relief is directly interested. And the writ will not be granted merely for the purpose of defining the powers and duties of public officers, independently of any direct personal interest upon the part of him who seeks the relief.[2]

§ 33 *a*. It is also to be observed that mandamus lies only to compel a public officer to perform a duty which is imposed upon him either by express enactment, or which results from the official station which he holds. In conformity with this principle the writ will not be granted against a public officer to compel the performance of an act which is unofficial in its character.[3] Nor will it be granted for the purpose of determining merely abstract questions, from whose determination no practical results can follow. Thus, the writ will not be allowed to compel the common council of a city to appoint certain officers, when the official term of the offices in question has already expired.[4]

§ 34. An important distinction to be observed in the outset, and which will more fully appear hereafter, is that between duties which are peremptory and absolute, and hence merely ministerial in their nature, and those which involve the exercise of some degree of official discretion and judgment upon the part of the officers charged with their performance. As regards the latter class of duties, concerning which the officer is vested with discretionary powers, while the writ may properly command him to act, or * 34 may set him in motion, it will not further control or interfere with his action, nor will it direct him to act in any specific manner. But as to the former class of cases, where mandamus is sought to compel the performance of a plain

[1] State *v.* Commissioners of the School Fund, 4 Kan. 261; State *v.* Taylor, 59 Md. 338.

[2] Mossy *v.* Harris, 25 La. An. 623.

[3] Pond *v.* Parrott, 42 Conn. 13; City of Napa *v.* Rainey, 59 Cal. 275.

[4] People *v.* Common Council of Troy, 82 N. Y. 575.

and unqualified duty, concerning which the officer is vested with no discretion, a specific act or duty being by law required of him, the writ will command the doing of the very act itself.[1]

§ 35. While the general rule is well established, that the existence of an adequate and specific remedy by the ordinary process of the courts, constitutes a sufficient bar to interference by mandamus, a mere statutory penalty against the officer for failure to perform an official duty is not regarded as such a remedy, and the writ will go, notwithstanding such penalty.[2] Nor will the fact that the party aggrieved by the non-performance of official duty has a remedy by an action against the officer upon his official bond, prevent the courts from lending their aid by mandamus to enforce the duty, the remedy upon the bond being inadequate for the grievance.[3]

§ 36. The duty whose performance it is sought to coerce by mandamus, must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform. Thus, the writ will not go to the treasurer of a municipal corporation, to require payment of money out of a fund not yet in his possession and to be thereafter received, such a degree of diligence not being contemplated by the law. And until the officer has actually received the money and refused to apply it as directed by law, there has been no failure in the performance of his duty and consequently no ground for a mandamus.[4] Nor will the writ be granted to compel the performance by public officers of an act or duty which they have never refused to perform,[5] or as to which it is not shown that they are delinquent.[6]

[1] Humboldt Co. v. County Commissioners of Churchill, 6 Nev. 30.

[2] King v. Everet, Ca. temp. H. 261.

[3] State v. Dougherty, 45 Mo. 294.

[4] State v. Burbank, 22 La. An. 298; State v. Dubuclet, 24 La. An. 16. See, also, Mayor of Baltimore v. Stoll, 52 Md. 435.

[5] State v. Board of Liquidation, 31 La. An. 273.

[6] State v. Van Winkle, 43 N. J. L. 125.

Where, however, an official duty is to be performed by an officer upon the happening of a particular event, he can not arbitrarily or capriciously refuse to perform the duty after the happening of such event upon the ground that he is not satisfied that it has yet happened. And in such case he may be compelled to act by mandamus.[1]

§ 37. It is regarded as of the very essence of the proceeding by mandamus to compel the performance of offical duties, that there should be some officer in being, having the power and whose duty it is to perform the act sought, since * 35 if there be no such officer it is obvious that the mandate of the court would be nugatory.[2] And where persons have been elected to certain offices, but have never qualified, and have never assumed any of the functions of the offices, nor acted in any manner, they can not be treated as officers *de facto* and are not subject to control by mandamus.[3] So it is a sufficient objection to issuing the writ to compel the performance of an official duty, that the officer is *functus officio*, and therefore unable to comply with the writ, or that the office has been abolished, so that the writ would prove unavailing if granted.[4] And where the term of office of the respondent has expired, and he resides beyond the jurisdiction of the court, the writ will be withheld.[5] So where it is apparent that before the issuing and service of the alternative writ requiring respondent to make a payment out of certain public funds, his term of office has expired and his successor has been elected and qualified, to whom he has turned over all the public funds in his hands, these facts constitute a good return to the writ, the proceedings appearing to have been in good faith.[6] So it has been held that the fact that

[1] Stockton R. Co. v. Stockton, 51 Cal. 328.

[2] State v. Supervisors of Beloit, 21 Wis. 280.

[3] Id.

[4] State v. Waterman, 5 Nev. 323; *Ex parte* Trice, 53 Ala. 546; Lamar v. Wilkins, 28 Ark. 34; State v. Steen, 43 N. J. L. 542.

[5] Mason v. School District, 20 Vt. 487.

[6] State v. Lynch, 8 Ohio St. 347.

respondent's term of office was about to expire, and that the time yet remaining was insufficient to allow the performance of the duty required, was a sufficient return to the writ.[1]

§ 38. Where, however, a continuing and perpetual duty is incumbent upon certain public officers, the rule is otherwise.[2] And in such case, the fact that the officers hold their tenure by annual election, and that their term of office has almost expired, will not prevent the court from interfering, since the duty, being continuing in its nature, may be enforced against the officers generally and their successors.[3] And when proceedings in mandamus are pending against a public officer at the expiration of his term of office, to compel the performance of an official duty, it is proper to revive the proceedings against his successor in office. Indeed, such practice is regarded as necessary to the administration of justice in view of the changes which are of frequent occurrence in public offices.[4] So when the object of proceedings in mandamus against a county officer is to enforce a right against the county through such officer, the proceedings do not abate by the expiration of the term of office. In such case the action is regarded as being against the office to compel the performance of a duty devolving upon it, regardless of the incumbent.[5] And when a peremptory mandamus has been awarded against a public officer, for the performance of an official duty, but his term of office has expired and the writ has not been obeyed, the court may grant an alias peremptory writ to his successor in office for the performance of the required act.[6]

[1] King *v.* Commissioners of Sewers, Ld. Raym. 1479.

[2] State *v.* Warner, 55 Wis. 271.

[3] People *v.* Collins, 19 Wend. 56. And see People *v.* Champion, 16 Johns. Rep. 61.

[4] Hardee *v.* Gibbs, 50 Miss. 802. See, *contra*, United States *v.* Boutwell, 17 Wal. 604, where it is held that, in the absence of any statutory provision to the contrary, upon the retirement from office of a public officer, proceedings against him in mandamus abate, and his successor can not be substituted upon the record as respondent.

[5] State *v.* Puckett, 7 Lea, 709; People *v.* Treasurer, 37 Mich. 351.

[6] People *v.* Supervisor of Barnett, 100 Ill. 332.

§ 39. Since mandamus lies only to compel the performance of duties clearly prescribed by law, it will not be granted where there is any substantial defect in the * 36 proof of the relator's right.[1] Especially will the courts refuse in such a case to interfere, when it is apparent that the interests of third parties, not before the court, are involved, even though the officer should express his willingness to perform the duty required.[2] Thus, the writ will not go to the commissioner of the general land office of a state for the purpose of procuring a title to public land, where it is apparent that there are other parties in interest claiming title to the land, who are not represented in the proceedings for mandamus, since the court will not pass upon their rights on a proceeding in which they are not parties.[3]

§ 40. The writ is never granted for the purpose of compelling the performance of an unlawful act, or of aiding in carrying out an unlawful proceeding. Thus, it will not lie where its result would be to subject respondents to an action of trespass, should they perform the act commanded.[4] Nor will it go to a state comptroller, requiring him to transfer upon the books of the state certificates of the funded indebtedness of the state, which have been sold under execution, in a manner different from that prescribed by law for the transfer.[5] Nor will it be granted to compel the performance of

[1] Bracken v. Wells, 3 Tex. 88.

[2] Bracken v. Wells, *supra;* Tabor v. Commissioner of Land Office, 29 Tex. 508.

[3] Tabor v. Commissioner of Land Office, 29 Tex. 508. And in Texas the doctrine is maintained that the writ will not lie to a state officer, as to a surveyor, to compel a survey of a tract of land, since the proceedings against the officer are virtually proceedings against the state, and can not, therefore, be maintained without its consent, and then only in the manner indicated by that consent. Hosner v. De Young, 1 Tex. 764; League v. De Young, 2 Tex. 497. But the doctrine is plainly contrary to the weight of authority, as we shall hereafter see.

[4] *Ex parte* Clapper, 3 Hill, 458. And see People v. Commissioners of Highways, 27 Barb. 94.

[5] Menard v. Shaw, 5 Tex. 334.

an official act when substantial doubt exists as to the duty of the officer to perform such act.[1]

§ 41. The question of the necessity of a demand and refusal to perform the duty in controversy, is one not wholly free from doubt, and an apparent conflict of authority may be observed in the adjudications upon this subject. The doctrine has been broadly asserted, and is sustained by the most respectable authorities, that in no event will the writ be granted to compel the performance of an official duty until demand has been made upon the officer and he has * 37 refused to act.[2] Other cases have gone only to the extent of insisting upon proof of demand and refusal before granting the writ in an absolute or peremptory form.[3] The better doctrine, however, and one which has the support of strong authority, is that which recognizes a distinction between duties of a public nature and affecting only the public at large, and those of a private nature especially affecting the rights of individuals. And it is held, where the person aggrieved has a private interest in or claims the immediate benefit of the act sought to be coerced, that he must first make a demand upon the officer to lay the foundation for relief by mandamus.[4] But as regards duties of a strictly public nature, incumbent upon public officers by virtue of their office, and which they are sworn to perform, no demand and refusal are necessary as a condition precedent to relief by mandamus. In such cases, no individual interests being affected, there is no one specially empowered to demand performance of the duty, and no necessity for a literal demand and refusal. The law itself

[1] *Ex parte* Barmwell, 8 Rich. N. S. 264.

[2] State *v.* The Governor, 1 Dutch. 331; State *v.* Lehre, 7 Rich. 234; State *v.* Davis, 17 Minn. 429. And see Condit *v.* Commissioners of Newton Co. 25 Ind. 422; Talcott *v.* Harbor Commissioners, 53 Cal. 109.

[3] Leonard *v.* House, 15 Geo. 473; Mauran *v.* Smith, 8 R. I. 192.

[4] Oroville & Virginia R. Co. *v.* Supervisors of Plumas, 37 Cal. 354. And see Commonwealth *v.* Commissioners of Allegheny, 37 Pa. St. 237; State *v.* County Judge of Marshall, 7 Iowa, 186; Same *v.* Bailey, Ib. 390.

stands in the place of a demand, and the neglect or omission to perform the duty stands in the place of a refusal; or, in other words, the duty makes the demand and the omission is the refusal.[1] Again, it has been held that if the duty is of such a character that its performance can not be expected without demand, the writ will not issue until demand is made; but where the duty is plain and specific, relating to an act which the law requires of public officers, no demand is necessary.[2] It must, however, in all cases clearly appear that the officer against whom the jurisdiction by mandamus is invoked, is actually in default in the performance of some act which the law specially enjoins as a duty * 38 resulting from his office.[3]

§ 42. We come next to the consideration of a fundamental rule, underlying the entire jurisdiction by mandamus, and especially applicable in determining the limits to the exercise of the jurisdiction over public officers. That rule is, that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall be finally given. And wherever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion and to require their action upon the matters officially entrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, nor attempt by mandamus to control or dictate the judgment to be given.[4] Indeed, so jealous are the courts

[1] State v. County Judge of Marshall, 7 Iowa, 186; State v. Bailey, Ib. 390; Commonwealth v. Commissioners of Allegheny, 37 Pa. St. 237.

[2] Humboldt Co. v. County Commissioners of Churchill, 6 Nev. 30.

[3] Cincinnati College v. La Rue, 22 Ohio St. 469.

[4] United States v. Seaman, 17 How. 225; United States v. The Commissioner, 5 Wal. 563; Secre-

of encroaching in any manner upon the discretionary powers of public officers, that if any reasonable doubt exists as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer.[1]

§ 43. Illustrations of the rule and of its application
* 39 are so numerous that it will suffice, in this connection, to indicate only a few of the more important. It will be observed that most of the cases in which the rule has been recognized and applied, are cases in which the powers of the officer, as to the act sought to be coerced, were powers of a quasi-judicial nature. And where the official duty in question involves the necessity upon the part of the officer of making some investigation, and of examining evidence and forming his judgment thereon, a proper case is presented for the application of the rule. Thus, where the question involved was, whether the relator, a printer to the senate of the United States, was entitled to receive from the superintendent of public printing and to print certain public documents, and in determining the ques-

tary *v.* McGarrahan, 9 Wal. 298; State *v.* Board of Liquidators, 23 La. An. 388; State *v.* Shaw, Ib. 790; State *v.* Warmoth, 23 La. An. 76; People *v.* Collins, 19 Wend. 56; People *v.* Attorney General, 22 Barb. 114; People *v.* Brennan, 39 Barb. 651; Freeman *v.* Selectmen of New Haven, 34 Conn. 406; King *v.* Licensing Justices, 4 Dow. & Ry. 735; State *v.* Robinson, 1 Kan. 188; State *v.* Bonner, Busb. L. 257; Commonwealth *v.* Cochran, 5 Binn. 87; Same *v.* Same, 6 Binn. 456; Seymour *v.* Ely, 37 Conn. 103; Swan *v.* Gray, 44 Miss. 393; People *v.* Adam, 3 Mich. 427; Howland *v.* Eldredge, 43 N. Y. 457; People *v.* Leonard, 74 N. Y. 443; State *v.* Police Jury, 29 La. An. 146; State *v.* Board of Liquidators, 29 La. An. 264; State *v.* Attorney General, 30 La. An. 954; Shober *v.* Cochrane, 53 Md. 544; Berryman *v.* Perkins, 55 Cal. 483; State *v.* Nash, 23 Ohio St. 568; United States *v.* Thacher, 2 MacArthur, 24; Hull *v.* Commissioner of Patents, 2 MacArthur, 90, 125; Holliday *v.* Henderson, 67 Ind. 103; Bledsoe *v.* International R. Co. 40 Tex. 537; Rutter *v.* The State, 38 Ohio St. 496; Bailey *v.* Ewart, 52 Iowa, 111; People *v.* Fairchild, 67 N. Y. 334; Queen *v.* Holl, 7 Q. B. D. 575; And see, for the application of the doctrine of the text to corporate officers, the chapters on Private Corporations and Municipal Corporations, *post.*

[1] State *v.* Warmoth, 23 La. An. 76.

tion of relator's right, it was necessary for the superintendent to investigate the usages and practice of congress upon the subject, and to examine evidence before forming his ultimate judgment, it was held that the duty was so far judicial in its nature that its performance could not be controlled by mandamus.[1] So the issuing of a patent for public lands by the commissioner of the United States land office, being a duty which involves the exercise of judgment and discretion in passing upon the proofs presented and in determining the questions of fact involved, mandamus for its performance will not lie to the secretary of the interior, or to the land commissioner.[2] And upon the same principle the writ will not be granted to compel the commissioner of patents to issue a patent which he has refused.[3]

§ 44. The duties of a board of registration, authorized by law to decide upon the qualifications of electors, are regarded as duties which, though not strictly judicial, yet require the exercise of judgment and discretion. Where, therefore, one has been refused the right of suffrage by such a board, he can not by mandamus compel them to admit him as an elector.[4] So where magistrates are entrusted by law with the power of granting licenses for public houses, and have acted upon an application and in the exercise of their discretion have refused the license, they can not be compelled by mandamus * 40 to re-hear the application.[5] And where the duty of selecting a route for a highway is confided by law to a special commission or board of officers, their decision will not be reviewed collaterally on proceedings by mandamus to com-

[1] United States v. Seaman, 17 How. 225.

[2] United States v. The Commissioner, 5 Wal. 563; Secretary v. McGarrahan, 9 Wal. 298.

[3] Hull v. Commissioner of Patents, 2 MacArthur, 90, 125.

[4] Freeman v. Selectmen of New Haven, 34 Conn. 406. But in Davies v. McKeeby, 5 Nev. 369, it was held that a registering officer might be required by mandamus to register the names of voters who were properly entitled to vote.

[5] King v. Licensing Justices, 4 Dow. & Ry. 735.

pel an inferior board to construct the highway as thus located.[1]

§ 44 *a*. In further illustration of the rule, the writ will not be granted to compel the auditor of a state, whose duty it is to publish certain public statements in newspapers having the largest general circulation, to publish in a particular paper, since he is required to exercise his judgment in making such selection.[2] And when a board of municipal officers are vested with discretionary powers of a judicial nature in the removal of subordinate officers, and when in the exercise of such discretion they have removed an officer, he can not be restored by mandamus.[3] Upon the same principle, when the teacher of a public school is empowered to suspend pupils from the privileges of the school, and has made such a suspension for misconduct, he will not be compelled by mandamus to restore such pupil.[4] And when a superintendent of schools is vested with discretionary powers as to the granting of certificates of qualification to teachers after examination, the writ will not be allowed to compel him to issue such a certificate.[5]

§ 45. Where, under the laws of a state, the attorney general of the state is empowered to determine in what cases proceedings by information in the nature of a quo warranto shall be instituted to try the title to any public office or franchise, he is regarded as vested with a discretion, the exercise of which is in its nature a judicial act, over which the courts have no control. And when such officer has declined to institute proceedings in quo warranto, mandamus does not lie to reverse his decision, or to compel him to bring the action.[6]

§ 46. In tracing the application of the rule under discus-

[1] People *v.* Collins, 19 Wend. 56.

[2] Holliday *v.* Henderson, 67 Ind. 103.

[3] State *v.* Board of Fire Commissioners, 26 Ohio St. 24.

[4] State *v.* Burton, 45 Wis. 150.

[5] Bailey *v.* Ewart, 52 Iowa, 111.

[6] People *v.* Attorney General, 22 Barb. 114; People *v.* Fairchild, 67 N. Y. 334; People *v.* Attorney General, 41 Mich. 728.

sion, it remains to be noticed that it is not limited to officers of a judicial nature, or whose duties are in the main quasi-judicial, but it is extended to all officers, whether of an executive or ministerial nature, who are, as to certain official acts or duties, vested with powers of a quasi-judicial character. And while, as we shall hereafter see in our examination of the law of mandamus as applicable to ministerial officers, the writ is freely granted to compel the performance of strictly ministerial duties, yet where officers, whose functions are chiefly ministerial, are yet entrusted with the performance of certain special duties requiring the exercise of judgment and discretion, they can not, as to such duties, be controlled by mandamus, and while they may be set in motion and compelled to act, the courts will not dictate what their action shall be.[1] Thus, where the location of a county seat is by law entrusted to the judgment of certain commissioners appointed for that purpose, who have performed their duty and fixed upon the location, their decision can not be controlled or altered by mandamus.[2] And where it is the duty of the clerk of a court to approve the bonds of all county officers, the act of approval is considered as so far partaking of a judicial nature that mandamus will not go to control the judgment of the clerk as to the approval of such a bond.[3] So where the clerk of a court refuses to approve of a bond tendered as security for costs in a judicial proceeding, upon the ground of its insufficiency, his approval will not be coerced by mandamus.[4] And when it is the duty of a board of county officers to pass upon the sufficiency of an official bond, while they may be set in motion and compelled to act,[5] the exercise of their

[1] Howland v. Eldredge, 43 N. Y. 457; People v. Brennan, 39 Barb. 651; State v. Robinson, 1 Kan. 188; State v. Bonner, Busb. L. 257; Commonwealth v. Cochran, 5 Binn. 87; Same v. Same, 6 Binn. 456; Seymour v. Ely, 37 Conn. 103: Swan v. Gray, 44 Miss. 393; People v. Adam, 3 Mich. 427.

[2] State v. Bonner, Busb. L. 257.

[3] Swan v. Gray, 44 Miss. 393. And see Ross v. The People, 78 Ill. 375.

[4] McDuffie v. Cook, 65 Ala. 430.

[5] State v. Commissioners of Belmont County, 31 Ohio St 451.

judgment as to such approval can not be controlled by mandamus.[1] Nor will mandamus be granted to compel the approval of an official bond, when it appears by the return that another person has been duly elected to the office and has entered upon the discharge of its duties.[2] Where, however, a board of supervisors, whose duty it is to accept the official bond of a public officer, have refused to accept it upon the sole ground that the officer was not elected, it appearing to the court that he was duly elected, he is entitled to the aid of a mandamus to compel the board to accept his bond.[3]

§ 47. It is held, in further illustration of the rule * 41 as applied to ministerial officers, that where the auditor general of a state is authorized to withhold tax deeds for land sold for unpaid taxes, if he shall discover that, on account of irregular assessments, or for any other cause, the lands should not have been sold, he is vested with powers so far judicial in their nature that mandamus will not lie to require him to issue a deed in such case.[4] And where it is made the duty of town assessors, whenever the consent of a majority of the tax-payers of the town shall be obtained to the issuing of town bonds in aid of a railway, to make affidavit of such fact, mandamus will not go to compel the assessors to make such affidavit, their judgment being final upon the matter.[5] While, in such case, it is conceded that the courts may by mandamus compel the officers to proceed and consider the evidence on which their decision must necessarily rest, the writ will not require them to come to any particular conclusion, since this would be, in effect, to take away their discretionary powers, and substitute the opinion of the court in lieu thereof.[6] And where a superintendent of highways is entrusted with the inspection of

[1] Buckman v. Comissioners of Beaufort, 80 N. C. 121.

[2] Commissioners v. The State, 61 Ind. 379.

[3] State v. Freeholders of Camden County, 35 N. J. L. 217.

[4] People v. Adam, 3 Mich. 427.

[5] Howland v. Eldredge, 43 N. Y. 457.

[6] Id.

improvements and repairs made upon the highways by the contractor for that purpose, and with the power of determining as to their sufficiency, and the contractor is to be paid only upon the superintendent's certificate of sufficiency, mandamus will not lie to compel the superintendent to issue his certificate, when in the exercise of his judgment he has decided otherwise.[1]

§ 48. As an illustration of the rule as applied to officers whose general functions are of an executive nature, it is held, under an act of legislature providing that the pub- * 42 lic advertising of a municipal corporation shall be given to four newspapers having the largest circulation, to be designated by the mayor and comptroller of the city, since the determination of the question of fact as to which papers have the largest circulation necessarily involves the hearing and consideration of evidence, that the writ will not go to compel such officers to designate particular papers. It is proper, however, to require the officers to meet and act upon the question, without directing them to act in a particular manner, or to reach a particular result.[2] So where a board of state officers are entrusted by law with the letting of contracts for the public printing of the state, and are vested with certain discretionary powers in determining what bids shall be accepted, the courts will not interpose by mandamus to control such discretion.[3]

[1] Seymour v. Ely, 37 Conn. 103.

[2] People v. Brennan, 39 Barb. 651; People v. Common Council of Troy, 78 N. Y. 33.

[3] State v. Robinson, 1 Kan. 188.

II. Election, Title and Possession of Offices.

§ 49. Questions of title and possession usually determined by quo warranto.
50. Reasons for refusing mandamus in such cases.
51. Illustrations of the rule.
52. Mandamus allowed to swear an officer.
53. Not allowed in cases of disputed title; when allowed to compel issuing of commission.
54. Will not lie to compel appointments to office.
55. Incidents to title and election to public offices.
56. The writ lies to canvassers of election returns.
56. *a*. How far court may consider returns.
57. Does not lie where officers are entrusted with judicial powers; nor where they have already acted.
58. The rule illustrated; mandamus refused to compel holding of election.
59. Not allowed to canvassers of elections before time to act.
60. The writ granted to compel issuing of certificates of election.
61. Foundation for the rule.
62. Application of the rule where office is already filled; remedy at law.
63. The rule applied regardless of general functions of officer.
64. Writ not granted where it would prove unavailing.
65. When allowed to compel issuing of commission.
66. Will lie to compel delivery of election returns; taking of testimony; issuing election notices.

§ 49. In determining the extent to which the courts
* 43 may properly interfere by mandamus with questions relating to the title to and possession of public offices, it is necessary to recur to an important principle, frequently asserted throughout these pages, and which may be properly termed the controlling principle governing the entire jurisdiction by mandamus. It is that in all cases where other adequate and specific remedy exists at law for the grievance complained of, the writ of mandamus is never granted. Applying this principle to cases where relief has been sought to determine disputed questions of title to and possession of

public offices, the courts have almost uniformly refused to lend their aid by mandamus, since the remedy by information in the nature of a quo warranto is justly regarded as the most appropriate and efficacious remedy for testing the title to an office, as well as the right to the possession and exercise of the franchise. And the rule may now be regarded as established by an overwhelming current of authority, that where an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, mandamus will not lie to compel the admission of another claimant, or to determine the disputed question of title. In all such cases, the party aggrieved who seeks an adjudication upon his alleged title and right of possession to the office, will be left to assert his rights by the aid of an information in the nature of a quo warranto, which is the only efficacious and specific remedy to determine the questions in dispute.[1] And whenever it is apparent on the face of the pleadings, that the issue presented involves a * 44 determination as to the person properly elected to an office or entitled to exercise its functions, the writ of man-

[1] People *v.* Corporation of New York, 3 Johns. Cas. 79; People *v.* Supervisors of Greene, 12 Barb. 217; Anderson *v.* Colson, 1 Neb. 172; Bonner *v.* State of Georgia, 7 Geo. 473; St. Louis Co. Court *v.* Sparks, 10 Mo. 118; State *v.* Rodman, 43 Mo. 256; People *v.* Common Council of Detroit, 18 Mich. 338; Underwood *v.* White, 27 Ark. 382; People *v.* Forquer, Breese, 68; State *v.* Dunn, Min. (Ala.) 46; Commonwealth *v.* Commissioners of Philadelphia, 6 Whart. 476; King *v.* Mayor of Colchester, 2 T. R. 260; Queen *v.* Derby, 7 Ad. & E. 419; King *v.* Winchester, Ib. 215; People *v.* Lane, 55 N. Y. 217; *In re* Gardner, 68 N. Y. 467; Denver *v.* Hobart, 10 Nev. 28; *Ex parte* Harris, 52 Ala. 87; Meredith *v.* Board of Supervisors, 50 Cal. 433; Duane *v.* McDonald, 41 Conn. 517; Harrison *v.* Simonds, 44 Conn. 318; Brown *v.* Turner, 70 N. C. 93. See also Swain *v.* McRae, 80 N. C. 111; State *v.* Palmer, 10 Neb. 203. But see, *contra*, Conlin *v.* Aldrich, 98 Mass. 557, where mandamus was granted to compel the members of a school committee to allow the relator to act as a member of the committee, although they had previously recognized a third person as a member and allowed him to act in that capacity. And in Harwood *v.* Marshall, 9 Md. 83, mandamus was held to be the proper remedy to determine the title to a disputed office, and to restore the relator thereto, even

damus will be withheld.[1] Nor is it the proper function of the writ of mandamus to restrain one who claims title to a public office from qualifying as such officer, or from discharging the duties of his office.[2]

§ 50. Aside from the existence of another adequate remedy by proceedings in quo warranto to test the title of an incumbent to his office, it is a sufficient objection to relief by mandamus in such a case, that the granting of the writ would have the effect of admitting a second person to an office already filled by another, both claiming to be duly entitled thereto, and resort must still be had to further proceedings to test the disputed title.[3] And the rule finds still further support in the fact that, ordinarily, the determination of the question of title to a disputed office upon proceedings in mandamus, would be to determine the rights of the *de facto* incumbent in a proceeding to which he is not a party.[4]

§ 51. In illustration of the rule under consideration, it has been held that where one claims to have been elected by the common council of a city to the office of assessor, and alleges that the council wrongfully deprive him of his office by refusing to count one vote in his favor, no case is presented authorizing the court to interfere by manda-
* 45 mus.[5] And where a decision upon the application for mandamus would have the effect of deciding which of two parties is entitled to exercise the chief executive power of the state, neither of them being before the court, the relief will be withheld and the parties will be left to proceedings

though quo warranto would lie, on the ground that the latter remedy might prove inadequate by reason of delay, and that while judgment of ouster might be given against the incumbent, such judgment would not necessarily install the claimant into the office, and he might still be obliged to resort to other process to obtain possession.

[1] Anderson v. Colson, 1 Neb. 172.

[2] People v. Ferris, 76 N. Y. 326.

[3] King v. Mayor of Colchester, 2 T. R. 260.

[4] St. Louis Co. Court v. Sparks, 10 Mo. 118; Commonwealth v. Perkins, 7 Pa. St. 42; People v. Forquer, Breese, 68; People v. Corporation of New York, 3 Johns. Cas. 79.

[5] People v. Common Council of Detroit, 18 Mich. 338.

in quo warranto, even though the relator shows a clear, legal right, which has been violated.[1]

§ 52. While, as we have thus seen, the courts refuse to lend their aid by mandamus to determine disputed questions of title to office, or to put a claimant into possession, a distinction has been drawn between such cases, and cases where the writ is sought merely for the purpose of swearing in a claimant to an office, and in the latter class of cases the relief has frequently been allowed.[2] But it is to be borne in mind that the effect of a mandamus to swear one into an office is not to create or confer any title not already existing, and while it may be the consummation of relator's title, if he have any, it creates no new title.[3]

§ 53. In all cases of doubt as to the election of officers, where the validity of the election is the chief point in controversy, the courts will not interfere by mandamus, but will put the aggrieved party in the first instance to an information in the nature of a quo warranto. And before a mandamus will be granted to compel the recognition of one as an officer, the court will require that judgment of ouster shall have been given against the incumbent *de facto*.[4] While there would seem to be no impropriety in the use of the writ to compel the issuing of a commission to a person duly * 46 elected to an office, yet to justify the exercise of the

[1] People *v.* Forquer, Breese, 68.

[2] King *v.* Clarke, 2 East, 75; Churchwardens case, Carth. 118; King *v.* Rees, Ib. 393; opinion of PARKER, C. J., in Rex *v.* Dean and Chapter of Dublin, Stra. 536; Queen *v.* Mayor of Hereford, 6 Mod. Rep. 309; King *v.* Knapton, 2 Keb. 445; Anon. Freem. K. B. 21; *Ex parte* Heath, 3 Hill, 42.

[3] King *v.* Clarke, 2 East, 75. In Rex *v.* Dean and Chapter of Dublin, Stra. 536, the doctrine is maintained by PARKER, C. J., that by granting the writ to swear one into an office, the court gives him a legal possession, and he is then as much entitled to the office as though in actual possession, and may then maintain his rights without the assistance of a mandamus. It is, however, impossible to reconcile this doctrine with the current of authority, and the principle as stated in the text is believed to convey the true doctrine deducible from the decided cases.

[4] Commonwealth *v.* County Commissioners, 5 Rawle, 75.

jurisdiction for this purpose, it is essential that the relator should show a good title to the office claimed.[1] And since the claimant can derive no title from an illegal or invalid election, the writ will not go to compel the issuing of a commission, where the laws of the state providing for the registration of voters have not been complied with.[2]

§ 54. The writ will not go to compel the making of an appointment to fill an office, where it has already been filled by the person who is properly vested with the power of appointment, especially if a better and more convenient remedy exists than by mandamus.[3] Nor will it be granted to compel the making of an appointment to an office, where it is apparent that the appointing power is about to proceed in the matter. Thus, where the management of the affairs of a state university is entrusted to a board of regents, and the aid of a mandamus is invoked to compel the regents to appoint to a particular professorship established by law, the writ will not be granted if it appears by the return that the regents have taken the necessary preliminary action in the matter, having appointed a committee for that purpose, and where it is not shown that they seek to evade the law by unnecessary delay.[4]

§ 55. Notwithstanding the rule denying relief by mandamus to compel admission to a disputed office or to determine the title thereto, there are certain incidents connected with the question of title and election to public offices, which from their nature involve the exercise of merely ministerial powers, and are hence properly subject to control by mandamus. Among these incidents are the canvassing of election returns, the issuing of certificates of election to the persons entitled thereto, and the issuing of a commission to a claimant duly elected. In all these cases we shall find no * 47 difficulty in arriving at a correct result, by keeping

[1] State v. Albin, 44 Mo. 346.
[2] Id.
[3] King v. Minister of Stoke Damerel, 1 Nev. & P. 56.
[4] People v. Regents of University, 4 Mich. 98.

constantly in view the distinction heretofore alluded to, between duties of a merely ministerial nature, involving the exercise of no official discretion, and duties quasi-judicial in their nature and calling for the exercise of a reasonable degree of official judgment and discretion.

§ 56. And, in the first place, as regards the duties of canvassing votes cast at an election and of making a return of the person elected, while it is doubtless true that such duties partake of a quasi-judicial nature, as far as concerns the determination of whether the papers received by the canvassers and purporting to be election returns, are, in fact, such returns, and are genuine and intelligible, and substantially authenticated as required by law, yet beyond these preliminary questions the duties of canvassers are regarded as chiefly ministerial. These preliminary questions being determined, the remaining duty of such canvassers in deciding who is elected is merely mechanical or ministerial, involving simply the labor of counting the votes returned and determining who has received the highest number. Whenever, therefore, such boards of canvassers have neglected or refused to perform this duty, or have only performed it in part, and have neglected to examine or include all the returns presented to them, they may be compelled by mandamus to proceed with the performance of their duty, leaving all questions of the validity of the election to be determined by the tribunals provided by law for that purpose.[1] For example, where it is alleged

[1] Clark *v.* McKenzie, 7 Bush, 523; State *v.* Gibbs, 13 Fla. 55; Ellis *v.* County Commissioners of Bristol, 2 Gray, 370; State *v.* Robinson, 1 Kan. 17; State *v.* County Judge of Marshall Co. 7 Iowa, 186; Same *v.* Bailey, Ib. 390; Kisler *v.* Cameron, 39 Ind. 488; State *v.* Dinsmore, 5 Neb. 145; State *v.* Stearns, 11 Neb. 104; State *v.* Garesche, 65 Mo. 480; State *v.* Berg, 76 Mo. 136; State *v.* Board of Inspectors, 6 Lea, 12; State *v.* Board of State Canvassers, 36 Wis. 498; Bradfield *v.* Wart, 36 Iowa, 291; Drew *v.* McLin, 16 Fla. 17; State *v.* Board of State Canvassers, 17 Fla. 29; Lewis *v.* Commissioners of Marshall Co. 16 Kan. 102; State *v.* Commissioners, 23 Kan. 264; Morgan *v.* Commissioners of Pratt Co. 24 Kan. 71; Privett *v.* Stevens, 25 Kan. 275; Commonwealth *v.* Emminger, 74 Pa. St. 479. See also State *v.* County Can-

that a state board of canvassers of elections have neglected and still neglect to canvass the votes returned upon an election for governor, and to determine and certify in the manner prescribed by law who has been elected to the office, sufficient cause is shown for issuing the alternative writ.[1] And since the canvassing of the votes is a ministerial act, a part performance of which is not a discharge of the duty, an adjournment of the canvassing board after making a partial canvass and declaring the result will not deprive the party aggrieved of his remedy by mandamus.[2] So when the board have completed the canvass and made an abstract or return of the votes before the expiration of the time fixed by law for that duty, but the abstract is still in the custody of a member of the board when notice is given of an alternative mandamus requiring them to count votes which they have illegally rejected, the peremptory writ may go, although the board had finally adjourned when the notice was served.[3] Nor is it a sufficient objection to relief in the state courts in this class of cases that the office in question is a federal office, such as representative in Congress, since the relator is entitled to his certificate of election from the state canvassers, although the canvass of the votes does not determine his right to the office, which is left for determination to the House of Representatives.[4] Nor is it a sufficient ground of demurrer to the alternative writ in such a case that the relator does not show that he is qualified for the office, the question of eligibility being left for determination by the House of Representatives.[5]

§ 56 *a*. In proceedings by mandamus to compel a board of canvassing officers to canvass the returns of an election and

vassers, 4 Rich. N. S. 485. But see State *v.* Strong, 32 La. An. 173.

[1] State *v.* Robinson, 1 Kan. 17. But the writ was refused in this case on the ground that the election was not held in the proper year.

[2] Lewis *v.* Commissioners of Marshall Co. 16 Kan. 102.

[3] State *v.* Berg, 76 Mo. 136.

[4] State *v.* Board of Canvassers, 17 Fla. 9.

[5] State *v.* Board of Canvassers, 17 Fla. 9.

to declare the result, it is proper for the court to ascertain and determine what are the true returns, since otherwise the proceedings would be wholly nugatory.[1] Allegations of fraud and bribery in the election are not, however, regarded as a proper subject for consideration by the court in this class of cases.[2] But while the courts will not ordinarily go behind the returns of the election, yet if it clearly appears that the election was grossly fraudulent, and that many more fraudulent votes were cast than there were legal voters, the returns being wholly false, the court may properly decline to interfere by mandamus.[3]

§ 57. It is to be borne in mind, that the general rule authorizing relief by mandamus in the class of * 48 cases under consideration, applies only where the functions of the canvassers are strictly ministerial in their nature; and where, as is sometimes the case, the powers of such officers are extended to and cover the decision of questions strictly judicial in their nature, the rule has no application. Thus, where boards of canvassers are empowered with the exercise of judicial functions over the whole question of the election, being authorized not only to perform the ordinary duties of canvassers, but also to hear and determine all contested elections, and no appeal lies from their decision, the courts will refuse to interfere by mandamus with the exercise of their discretion or judgment, and will regard their decision as final and conclusive.[4] So where a special act of legislature providing for the location of a county seat, makes

[1] State *v.* Garesche, 65 Mo. 480.

[2] State *v.* County Judge of Marshall, 7 Iowa, 186.

[3] State *v.* Stevens, 23 Kan. 456. See also State *v.* Marston, 6 Kan. 524. In State *v.* Foster, 38 Ohio St. 599, it is held that when the canvassing board, in canvassing the election returns, have aggregated the votes cast for H. L Morey with those cast for Henry L. Morey, treating the persons as one and the same, and have given the certificate of election accordingly, they will not be required by mandamus to recount such votes as given for different persons, when it is not shown that they were intended for different persons.

[4] Grier *v.* Shackleford, 2 Brev.(2nd

it the duty of a judge of the county to canvass the returns of the election upon the question of location, such officer is regarded as vested with powers of a judicial nature in determining whether the election has been held and the returns have been properly made in the different precincts, and also the sufficiency of the returns and their genuineness. Where, therefore, he has, in the exercise of his judgment, passed upon and rejected certain returns, mandamus will not go to compel him to again pass upon and to receive them.[1] And, generally, it will suffice to say that the writ does not lie to canvassers of elections to compel them to canvass the returns after they have once performed this duty and the matter has passed beyond their jurisdiction, even though they have erred in rejecting votes which should have been received.[2] In such case, the person returned as elected being actually in possession of the office under color of right, the question of title to the office can only be determined by proceedings * 49 in quo warranto against the incumbent, and it is a sufficient objection to the exercise of the jurisdiction that the writ, if granted, would be nugatory or ineffectual.[3] And in proceedings by mandamus involving collaterally the right of contesting claimants to an office, the court will not review the decision of a board of canvassers, such decision being treated as conclusive except in proceedings by quo warranto.[4] And where the duties of a canvassing board are purely ministerial, and they are not authorized to hear evidence, they will not be compelled by mandamus to count certain votes which it is claimed should be counted.[5]

§ 58. In conformity with the doctrine of the preceding

edition) 549; Mayor of Vicksburg v. Rainwater, 47 Miss. 547; *Ex parte* Mackey, 15 S. C. 322; State v. Board of Selectmen, 25 La. An. 310.

[1] Arberry v. Beavers, 6 Tex. 457. See also Bell v. Pike, 53 N. H. 473.

[2] People v. Supervisors of Greene, 12 Barb. 217; State v. Rodman, 43 Mo. 256; Oglesby v. Sigman, 58 Miss. 502.

[3] People v. Supervisors of Greene, 12 Barb. 217; State v. Rodman, 43 Mo. 256.

[4] People v. Stevens, 5 Hill, 616.

[5] Clark v. Board of Examiners, 126 Mass. 282.

section, it is held that where a statute directs a board of county commissioners to order an election for county officers, provided a certain number of qualified electors shall petition for such election, and it is made the duty of the board to ascertain whether the requisite number of voters have joined in the petition, and whether they are qualified electors, mandamus does not lie to control them in the exercise of this duty, since it partakes of a judicial nature, and the board are required to determine upon the exercise of their own judgment. Where, therefore, they have acted officially upon the matter and have refused to order an election, mandamus will not go to compel them to make such order.[1]

§ 59. In no event will the writ issue to canvassers of election returns, to control or interfere with their action before the time when it is made by law their duty to act, since there can be no omission or neglect to perform a duty, when the time has not yet arrived for its performance. And no mere threats or predetermination on the part of the canvassers, before the time when the performance of the duty is required at their hands, can alter the rule or vary its application.[2] Nor will the writ go to compel an officer to receive and canvass the votes upon an election, when it is not his clear duty so to do.[3] And where it appears that there was no vacancy in the office in question, and that the election was unnecessary and unauthorized, the writ will not be awarded to compel a canvass of the votes cast at such election.[4]

§ 60. The duty of canvassing election returns and ascertaining the person elected being, as we have thus seen, a ministerial duty, involving the exercise of no discretion, and properly subject to the coercive action of the writ of mandamus, it follows necessarily that the same rule may be applied to the duty of issuing a certificate of election to the

[1] State v. Commissioners of Eureka, 8 Nev. 309.

[2] State v. Carney, 3 Kan. 88.

[3] State v. Randall, 35 Ohio St. 64.

[4] Peters v. Board of State Canvassers, 17 Kan. 365.

* 50 person who has received the greatest number of votes.

And the rule is equally well established, that where canvassers of election returns, or other officers, are entrusted by law with the duty of issuing a certificate of election to the person receiving the highest number of votes, the performance of this duty, being merely a ministerial act, involving the exercise of no judicial functions, is a proper subject of control by the writ of mandamus on refusal of the officer or board to perform the act.[1] Thus, where inspectors of city elections, who are regarded as officers within the meaning of the law, are entrusted simply with ministerial duties, such as casting up the votes given for each person and declaring the result, without any authority to determine as to the validity of the election, or the legality of the votes received, their functions are regarded as being in no sense judicial, and mandamus will go to compel them to issue a certificate * 51 of election to the person who has received the highest number of votes.[2]

§ 61. The rule, as thus stated, in no manner conflicts with the principle heretofore discussed, that mandamus does not lie to compel admission to an office, since the courts have recognized a clear distinction between the two classes of cases. And while the granting of the writ to admit an applicant to an office would necessarily have the effect of determining the title thereto, no such effect can possibly attach to the writ when applied to compel the issuing of a certificate of election. The certificate of election is by no means conclusive as to the right to the office, but is merely evidence of a *prima facie* title thereto, upon which, it is true, the holder may afterwards be enabled to prosecute his right in another form of proceed-

[1] *In re* Strong, 20 Pick. 484; People *v.* Rivers, 27 Ill. 242; People *v.* Hilliard, 29 Ill. 419; Brower *v.* O'Brien, 2 Ind. 423; Kisler *v.* Cameron, 39 Ind. 488; State *v.* Circuit Judge of Mobile, 9 Ala. 338; State *v.* Gibbs, 13 Fla. 55; Ellis *v.* County Commissioners of Bristol, 2 Gray, 370; Clark *v.* McKenzie, 7 Bush, 523; Pacheco *v.* Beck, 52 Cal. 3. And see People *v.* Matteson, 17 Ill. 167; State *v.* Lawrence, 3 Kan. 95.

[2] Kisler *v.* Cameron, 39 Ind. 488.

ing, but which does not of itself carry title or determine the right.[1] In all such cases, the courts proceed by mandamus upon the presumption that the counting of the votes and ascertaining the majorities, and then giving certificates of the result, are merely ministerial acts, and that the canvassers, from the nature of the case, can have no discretion in determining who is elected, this being a matter of mathematical calculation, or a conclusion to be drawn from the facts, and in no manner subject to the control of the officer upon those facts.[2] The granting of the writ under such circumstances neither has the effect of turning out the actual incumbent of the office, nor of affecting his rights in any manner, since he is not before the court.[3] It merely places the relator in a position to be enabled to assert his right, which he might otherwise not be enabled to do.[4]

§ 62. From the nature of the principles thus far considered, and which are believed to have the undoubted sanction of the best authorities, it necessarily follows that the fact of the office being already filled, by an incumbent *de facto*, affords no bar to the granting of the writ to compel the issuing of a certificate of election.[5] And ordinarily * 52 the fact that the canvassing officers have given a certificate of election to another person, will not prevent the granting of the writ to require them to certify the election of the relator, he appearing to be properly entitled thereto.[6] Otherwise, however, where proceedings are already pending to

[1] State *v.* Gibbs, 13 Fla. 55; People *v.* Hilliard, 29 Ill. 419. And see Ellis *v.* County Commissioners of Bristol, 2 Gray, 370.

[2] State *v.* Circuit Judge of Mobile, 9 Ala. 338; *In re* Strong, 20 Pick. 484.

[3] People *v.* Rivers, 27 Ill. 242.

[4] Brower *v.* O'Brien, 2 Ind. 423.

[5] *In re* Strong, 20 Pick. 484. See, however, Magee *v.* Supervisors of Calaveras, 10 Cal. 376, where it is held that if the canvassers have performed their duty, and in the exercise of their discretion have declared the result of the election adversely to the claimant, he can not have mandamus to compel the issuing of a certificate, his remedy being by proceedings in quo warranto.

[6] Ellis *v.* County Commissioners of Bristol, 2 Gray, 370; Clark *v.* McKenzie, 7 Bush, 523; State *v.*

procure relief in another manner. And where upon a canvass of votes a certificate of election has been issued to a person, who is thereupon commissioned and enters upon the performance of his duties, mandamus will not go to the officer who has issued the certificate, requiring him to certify the election of another person, where proceedings at law are already pending to test the validity of the election, in a court which has rightfully acquired jurisdiction of the case, and which is fully empowered to do justice in the premises.[1] Nor will the writ go to compel the issuing of a certificate of election when a statute has provided an adequate and complete remedy for contesting the election, of which the relator has neglected to avail himself at the proper time.[2]

§ 63. The application of the rule is not affected by the * 53 general nature or functions of the officer against whom the writ is sought, provided he be authorized to issue the certificate to the person entitled thereto. And the jurisdiction by mandamus in such cases has been exercised against boards of canvassers,[3] county clerks,[4] and clerks of court,[5] the courts being influenced in granting the relief, rather by the nature of the duty to be performed, than by the general functions of the officer by whom it is to be performed. Accordingly where it is made by law the duty of a secretary of state to issue certificates of election to officers declared by a board of canvassers to be elected, mandamus will go requiring him to issue a certificate.[6] And the fact that the secretary has given a certificate to another person, who has not

Lawrence, 3 Kan. 95; People v. Rivers, 27 Ill. 242; People v. Hilliard, 29 Ill. 419.

[1] People v. Cover, 50 Ill. 100.

[2] State v. Stewart, 26 Ohio St. 216. But mandamus has been allowed to compel the issuing of a certificate of election to the relator by the incumbent *de facto* of the office in dispute. Brower v. O'Brien, 2 Ind. 423.

[3] Clark v. McKenzie, 7 Bush, 523; Ellis v. County Commissioners of Bristol, 2 Gray, 370; State v. Gibbs, 13 Fla. 55.

[4] People v. Rivers, 27 Ill. 242.

[5] Brower v. O'Brien, 2 Ind. 423.

[6] State v. Lawrence, 3 Kan. 95.

been declared entitled thereto by the board of canvassers, constitutes no sufficient return to the alternative writ.[1]

§ 64. It is a sufficient objection to granting the writ to require a board of officers to declare the relator elected to a particular office, that the term for which he claims to have been elected will expire before any effectual action can be had in the case, since the courts will not interpose where the writ would prove unavailing.[2] Nor will the writ be granted where there has been no actual vacancy in the office, and the present incumbent is rightfully in possession.[3] So it will be withheld where the applicant has not shown himself to be duly elected, and the only effect of interfering would be to declare the election void.[4]

§ 65. Mandamus has been recognized as the appropriate remedy to compel the issuing of a commission to an * 54 officer properly entitled thereto. Thus, where under the constitution and laws of a state, the secretary of state is held to be only a ministerial officer, in as far as concerns the duty of affixing his official signature and the seal of the state to commissions issued by the governor of the state, he having no supervisory powers in determining whether such official acts as require his attestation are constitutional or unconstitutional, mandamus lies to compel him to sign and seal a commission issued by the governor.[5]

§ 66. A state officer who is entitled to the possession of election returns, which have been improperly delivered to another, may compel their delivery to himself by mandamus.[6] And where it is the duty of persons who have been

[1] State *v.* Lawrence, 3 Kan. 95.

[2] Woodbury *v.* County Commissioners, 40 Me. 304.

[3] Rose *v.* County Commissioners, 50 Me. 243; State *v.* Whittemore, 11 Neb. 175.

[4] State *v.* Judge of Ninth Circuit, 13 Ala. 805.

[5] State *v.* Wrotnowski, 17 La. An. 156. And see Magruder *v.* Swann, 25 Md. 173. But see, *contra*, State *v.* The Governor, 1 Dutch. 331; State *v.* The Governor, 39 Mo. 388; Hawkins *v.* The Governor, 1 Ark. 570; Taylor *v.* The Governor, Ib. 21.

[6] State *v.* Hayne, 8 Rich. N. S. 367.

duly selected for that purpose to take the testimony upon a contested election they may be compelled by mandamus to perform such duty.[1] So where the duty is incumbent upon a particular officer, as a secretary of state, of issuing election notices designating the officers who are to be elected, he may be compelled by mandamus to issue a new notice when he has omitted from the notice as issued one of the officers to be voted for at the election.[2]

III. Amotion From Public Offices.

§ 67. Mandamus the proper remedy to correct a wrongful amotion from office.
68. Removal without charges or sworn evidence a ground for mandamus.
69. Distinction between absolute power of amotion and power to remove for due cause.
70. Writ not granted to restore officer merely *de facto*.
71. Ecclesiastical offices, amotion from corrected by mandamus only where temporalities are attached.
72. Return to writ insufficient where notice to accused is not shown before amotion.

§ 67. We have already seen that the courts refuse to lend their extraordinary aid by mandamus to determine disputed questions of title to office, or to compel the admission of a claimant in the first instance, where he has never been in * 55 possession of the office or exercised its franchises.[3]

Where, however, one has been in the actual and lawful possession and enjoyment of an office, from which he has been wrongfully removed, a different case is presented. And mandamus is recognized as a peculiarly appropriate remedy to correct an improper amotion from a public office, and to restore to the full enjoyment of his franchise a person who has been im-

[1] State *v.* Peniston, 11 Neb. 100.
[2] People *v.* Carr, 86 N. Y. 512.
[3] See *ante*, § 49.

properly deprived thereof.[1] And where one has been wrongfully deprived of his office by the illegal appointment of another, the writ will go to compel his restoration, even though the person appointed in his stead be in possession *de facto*.[2]

§ 68. The general common-law rule that to warrant the removal of an officer, specific charges should be brought against him and all witnesses in the matter should be sworn, is held applicable even to offices unknown to the common law and created by statute, and the disregard of this rule in the amotion of an officer may authorize the aid of a mandamus to compel his restoration. And the writ will go to a board of commissioners appointed by an act of legislature for the performance of certain public duties, requiring them to restore a member whom they have displaced in disregard of the common-law principle above stated.[3]

§ 69. While, in the application of the rule under discussion, it is conceded that if the power of removal from an office rests in the discretion of any other officer or * 56 body of officers, the exercise of that discretion will not be interfered with by mandamus, yet a distinction is taken between cases where such power of removal rests absolutely

[1] State *v.* Common Council of Watertown, 9 Wis. 254; Lindsey *v.* Luckett, 20 Tex. 516; Drew *v.* Judges of Sweet Springs, 3 Hen. & M. 1; Geter *v.* Commissioners, 1 Bay, 354; Singleton *v.* Same, 2 Bay, 105; *Ex parte* Diggs, 52 Ala. 381; *Ex parte* Wiley, 54 Ala. 226; Milliken *v.* City Council, 54 Tex. 388. But see, *contra*, State *v.* Dunlap, 5 Mart. 271, where it is held in an able opinion, that the courts should not ordinarily interfere by mandamus to restore an officer who has been deprived of his office, since he may maintain an action at law for damages, and the intruder may be ousted by proceedings in quo warranto. To interfere by mandamus in such a case, would, it is held, be taking cognizance in an extraordinary manner of the right to an office contested by two persons, where the dispute might be effectually determined in the ordinary course of justice. While the doctrine of this case is certainly more in harmony with the general principle, denying relief by mandamus where other adequate remedy may be had by law, than is the rule laid down in the text, it is opposed to the current of authority upon the particular point in question.

[2] Drew *v.* Judges of Sweet Springs, 3 Hen. & M. 1.

[3] Geter *v.* Commissioners, 1 Bay, 354; Singleton *v.* Same, 2 Bay, 105.

in the discretion of other officers, and cases where they are only empowered to remove "for due cause." In the latter class of cases, the words "for due cause" are regarded as a limitation upon the power of removal, and the determination of what is such cause is deemed a question of law, whose ultimate determination rests, not with the officers empowered to remove, but with the courts. In other words, while the judgment of inferior boards or tribunals upon matters which properly rest in their discretion will not be controlled or interfered with by mandamus, their judgment as to what the law allows them to determine, or as to the extent of their jurisdiction, may be so controlled.[1] And where it is shown by the return that the grounds relied upon to justify * 57 the removal, relate to acts committed during a prior term of office, involving no moral delinquency, and which, if violations of duty at all, were well known to the appointing power at the time of re-appointment of the officer, such acts are not deemed sufficient cause for the removal. Under such circumstances, the re-appointment is regarded as a condonation of the offence, and mandamus will lie to restore the officer.[2] And a distinction is recognized between the jurisdiction by mandamus to compel the restoration of an officer to an office from which he has been wrongfully removed, and the power of appointment to the office. For, while the courts will not interfere with the discretion of inferior tribunals as to whom they shall appoint to offices within their control, they may and will compel them by mandamus * 58 to restore one to an office to which he is justly entitled, but of which he has been wrongfully deprived.[3]

§ 70. It is to be borne in mind that the rule as above stated is applied only in favor of those who are clearly entitled, *de jure*, to the office from which they have been removed. And where the writ is sought to compel the restoration of

[1] State v. Common Council of Watertown, 9 Wis. 254.

[2] State v. Common Council of Watertown, 9 Wis. 254.

[3] State v. Common Council of Watertown, 9 Wis. 254.

one claiming the right to an office, it is not sufficient for him to show that he is the officer *de facto*, but it is also incumbent upon him to show a clear, legal right, and failing in this he is not entitled to the peremptory writ.[1]

§ 71. As regards offices of an ecclesiastical or spiritual nature, questions of much nicety have arisen in determining how far the civil courts may interfere to restore one who has been improperly removed from his office. The true distinction taken, both in England and America, in fixing the limits of the jurisdiction by mandamus over such cases, turns upon the question as to whether the offices, though in the main ecclesiastical in their nature, yet carry with them certain temporal rights or endowments entitling them to the protection of the civil courts, or whether they are purely spiritual in their functions and incidents, unconnected with any temporalities or emoluments.[2] In the former class of cases, the power of the civil courts to restore one who has * 59 been wrongfully removed is well established. Thus, in the case of the curacy of a chapel, endowed with certain temporal rights, of which the curate has been wrongfully deprived after a long and uninterrupted enjoyment and possession, a fitting case is presented for the interference of the civil courts.[3] In such case, mandamus to restore is said by Lord MANSFIELD to be the true specific remedy, the relator being wrongfully dispossessed of an office or function drawing with it certain temporal rights, where in the established course of justice the law has provided no other remedy.[4] So it lies,

[1] Justices of Jefferson Co. *v.* Clark, 1 Mon. 82. And see Justices of Spencer Co. Court *v.* Harcourt, 4 B. Mon. 499.

[2] Rex *v.* Blooer, Burr. 1043; Union Church *v.* Sanders, 1 Houst. 100.

[3] Rex *v.* Blooer, Burr. 1043; Runkel *v.* Winemiller, 4 Har. & McHen. 429. And see Brosius *v.* Reuter, 1 Har. & J. 480; S. C. Ib. 551. But see Smith *v.* Erb, 4 Gill, 437.

[4] Rex *v.* Blooer, *supra*. So in England the writ lies to compel the trustees of a dissenting church to admit a minister to the pulpit who has been duly elected pastor of the church. Rex *v.* Barker, Burr. 1265.

in England to restore a sexton to his place.[1] But it will not lie to the doctors commons to restore a proctor, the office being regarded as purely spiritual and not subject to control by the kings bench.[2] And where the office is purely ecclesiastical, unconnected with any stipend, salary or emolument, as in the case of the pastorate of a church, whose incumbent receives no regular salary or stipend, but is supported entirely by private and voluntary contributions, the civil courts will refuse to lend their aid by mandamus to correct an amotion from the office.[3] Nor in such case does the fact that
* 60 the trustees of the church are incorporated under the
* 61 general law of the state to take charge of the temporalities of the church, affect the application of the rule.[4]

§ 72. Since a summons to answer the charges preferred against an officer is necessary to constitute a proper amotion, it follows that a return to the alternative writ to restore the officer removed is insufficient if it fails to show such summons or notice.[5]

IV. Books, Records and Insignia of Office.

§ 73. Mandamus lies for custody of official records, seals and insignia.
74. The rule illustrated; inspection of books and records.
75. Degree of title necessary.
76. Writ lies for custody of public buildings.
77. Not granted where title to office is the real point in issue.
78. Not allowed where other remedy may be had at law.
79. Allowed to compel holding of office or court at county seat; but not to determine election for removal of county seat.

§ 73. The principles thus far discussed and illustrated, as to the extent to which the courts will interfere by mandamus

[1] Anon. Freem. K. B. 21.

[2] Lee's case, Carth. 169; Lee v. Oxenden, 3 Salk. 230; Rex v. Lee, 3 Lev. 309.

[3] Union Church v. Sanders, 1 Houst. 100.

[4] Union Church v. Sanders, 1 Houst. 100.

[5] King v. Gaskin, 8 T. R. 209.

with questions of title to and possession of offices, and incidents relating thereto, have shown the extreme jealousy of the courts to lending their extraordinary aid in any case where its effect would be to determine disputed questions of title, all such questions being properly determinable by proceedings in quo warranto. It remains to consider such incidents connected with public offices as the books, records, seals and other insignia of office, which, though intimately connected with the official position, do not form a necessary part of it. And it may be asserted as a general rule, that mandamus lies to compel the transfer or delivery of the books, seals, muniments, records, papers and other paraphernalia pertaining to a public office to the person properly * 62 entitled to their custody, and the writ may even be extended to the case of public buildings pertaining to an office, and may require the surrender of such buildings to the person legally entitled thereto.[1]

§ 74. The branch of the jurisdiction under discussion is of ancient origin and was exercised by the king's bench at an early day.[2] And whenever the term of an officer has expired, he may be compelled by mandamus to turn over to his successor all records and books pertaining to his office to

[1] People *v.* Kilduff, 15 Ill. 492; People *v.* Head, 25 Ill. 325; Crowell *v.* Lambert, 10 Minn. 369; Atherton *v.* Sherwood, 15 Minn. 221; State *v.* Layton, 4 Dutch. 244; Burr *v.* Norton, 25 Conn. 103; Runion *v.* Latimer, 6 Rich. N. S. 126; State *v.* Johnson, 29 La. An. 399; Territory *v.* Shearer, 2 Dakota, 332; Frisbie *v.* Trustees, 78 Ind. 269; Felts *v.* Mayor, 2 Head, 650; King *v.* Owen, 5 Mod. Rep. 314; Rex *v.* Clapham, 1 Wils. 305; King *v.* Ingram, 1 Black. W. 50. And see Hooten *v.* McKinney, 5 Nev. 194; Bonner *v.* State of Georgia, 7 Geo. 473; Nelson *v.* Edwards, 55 Tex. 389. See as to mandamus to compel the delivery of books and records pertaining to corporate offices, American Railway Frog Co. *v.* Haven, 101 Mass. 398; State *v.* Goll, 3 Vroom, 285; St. Luke's Church *v.* Slack, 7 Cush. 226; Rex *v.* Wildman, Stra. 879; Anon. 1 Barn. K. B. 402. And see as to delivery of books and records pertaining to municipal offices, Walter *v.* Belding, 24 Vt. 658; Stone *v.* Small, 54 Vt. 498; Kimball *v.* Lamprey, 19 N. H. 215; King *v.* Payn, 1 Nev. & P. 524.

[2] See King *v.* Owen, 5 Mod. Rep. 314.

which the public are entitled to access.[1] And the writ may even be granted for this purpose in aid of the person declared duly elected to the office and holding the certificate of election, and duly sworn, although proceedings are pending to test the legality of his election, since the court by granting the writ does not finally determine upon the legality of the election.[2] So the writ will go to the former mayor of a city, requiring him to deliver to the newly-elected mayor the common seal of the municipality.[3] And while it is true that quo warranto is the only method of determining disputed questions of title to public offices, yet a mere groundless assumption of an election on the part of the respondent, and a pretended exercise of the functions of the office *de facto*, will not deter the court from granting the mandamus.[4] So mandamus will lie to compel a public officer to permit an inspection of his books and accounts by a person entitled to such inspection.[5] And when it is the duty of a state officer having custody of certain books and records to permit persons authorized by law to inspect the same and to make copies or extracts therefrom, mandamus is the appropriate remedy to compel the performance of this duty.[6]

§ 75. As regards the evidence of his title which the * 63 relator must show who seeks the aid of mandamus to recover possession of official records and insignia, it is held that, having received a certificate of election and qualified in the manner provided by law, he is *prima facie* entitled to their possession and may enforce his rights by aid of the writ.[7] And upon the application for mandamus, the court will not go behind the certificate of election and try the relator's actual title. It is, therefore, wholly immaterial whether the relator was eligible to the office in question, or

[1] Rex v. Clapham, 1 Wils. 305; People v. Head, 25 Ill. 325.

[2] People v. Head, 25 Ill. 325. And see Crowell v. Lambert, 10 Minn. 369.

[3] People v. Kilduff, 15 Ill. 492.

[4] People v. Kilduff, 15 Ill. 492.

[5] Brewer v. Watson, 61 Ala. 310.

[6] State v. Hobart, 12 Nev. 408.

[7] Crowell v. Lambert, 10 Minn. 369.

whether he was duly elected thereto, since to try such issues would be to determine the title upon proceedings in mandamus, which the courts will never do.[1] And mandamus will not lie to a county clerk to compel the delivery of assessment books to one claiming to be duly elected as assessor, when the clerk has already delivered the books to a *de facto* assessor.[2] If, however, the respondent has actually obtained judgment in his favor in proceedings to test the election, the relator is not entitled to the writ, even though he has appealed from the judgment against him and the appeal is still pending.[3] Nor will the relief be granted upon the application of one whose title to the office is uncertain and doubtful.[4]

§ 76. The writ may be granted to compel the surrender of public buildings to the officer properly entitled to their custody as an incident to his office, where a former officer refuses to surrender them.[5] In such case, the term of the person in possession having expired, he is regarded as in possession without any colorable right or title of any nature, and is therefore a mere intruder, for whose expulsion a prompt and efficient remedy is necessary.[6] So where the sheriff of a county is entitled by law to the custody of the county jail, of which he has been wrongfully deprived, he is entitled to the aid of a mandamus to restore him to possession.[7] And where it is made by law the duty of the county clerk of a particular county to provide for the transfer of cer- * 64 tain records to a new county created out of the old, the writ will go to compel the performance of this duty.[8]

§ 77. But if it be apparent to the court that, instead of a

[1] Atherton v. Sherwood, 15 Minn. 221.

[2] People v. Lieb, 85 Ill. 484.

[3] Allen v. Robinson, 17 Minn. 113.

[4] State v. Dusman, 39 N. J. L. 677.

[5] State v. Layton, 4 Dutch. 244; Felts v. Mayor, 2 Head, 650; Burr v. Norton, 25 Conn. 103; Warner v. Myers, 4 Oregon, 72.

[6] State v. Layton, 4 Dutch. 244.

[7] Felts v. Mayor, 2 Head, 650; Burr v. Norton, 25 Conn. 103.

[8] Hooten v. McKinney, 5 Nev. 194.

proceeding whose object is only to get possession of the books and insignia of an office, the writ is invoked, in reality, to test the title to the office, and that the question of title is the real point in issue, it will refuse to lend its aid by mandamus. In all such cases, the parties will be left to a determination of the disputed questions of title by proceedings upon information in the nature of a quo warranto, since this is the only remedy in which judgment of ouster can be had against an actual incumbent, and the person rightfully entitled can be put into possession of the office.[1] The court will not, therefore, upon an application for a mandamus to procure possession of official records, inquire into the right of a *de facto* incumbent of the office, and if it is apparent that the relator's rights can not be determined without such an investigation into respondent's title, mandamus will not lie.[2]

§ 78. It is worthy of note that the cases in which the courts have interposed by mandamus for the surrender of books, papers and other insignia pertaining to public offices, are cases where the person in possession claimed under some color of right, and are, for the most part, cases where the books and records were claimed by a former incumbent of the office, or person claiming to be entitled to its possession and to the exercise of its functions. And where, under the laws of a state, mandamus can only issue to an inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office or trust, the writ will not lie for the surrender of official records and insignia, if it is apparent from the record that the respondent is merely a private person, not claiming the right of possession by virtue of any office or trust.[3] So where one has been employed to make a survey of the public roads of a county and to plat them in a suitable book, mandamus will not go to compel him to

[1] People *v.* Stevens, 5 Hill, 616; People *v.* Olds, 3 Cal. 167; State *v.* Williams, 25 Minn. 340.

[2] State *v.* Pitot, 21 La. An. 336; State *v.* Williams, 25 Minn. 340.

[3] Hussey *v.* Hamilton, 5 Kan. 462.

deliver possession of such book.[1] In all such cases, ample relief may be had in the ordinary course of law, and the party aggrieved will be left to pursue such remedy.[2] * 65 Indeed, it is always a complete objection to the issuing of the writ to compel the delivery of the books and paraphernalia of an office, that a direct and specific remedy is provided by statute for obtaining them.[3]

§ 79. Mandamus is the appropriate remedy to compel county officers to hold their offices at the county seat, and to remove their books and records thereto after a new location of the county seat has been made, and to compel a judge to hold his court at the county seat.[4] So, pending a contest as to the removal of a county seat, mandamus will lie to compel a judge to hold court at the original county seat.[5] But where the writ is sought to compel county officers to remove their records and to maintain their offices at a place alleged to have been chosen as the county seat at an election held for that purpose, and it clearly appears that the returns of the election are grossly false and fraudulent, the court may, in the exercise of its discretion, go behind the election returns and refuse to grant relief.[6] And while there may be no impropriety in granting the writ to compel county officers to hold their offices at the place designated by law, or to remove upon a change in the location of the county seat, yet where

[1] State *v.* Trent, 58 Mo. 571.

[2] Hussey *v.* Hamilton, 5 Kan. 462.

[3] People *v.* Stevens, 5 Hill, 616.

[4] County of Calaveras *v.* Brockway, 30 Cal. 325; State *v.* Saxton, 11 Wis. 27; Commissioners *v.* The State, 61 Ind. 75; State *v.* Lean, 9 Wis. 279; State *v.* Thatch, 5 Neb. 94; State *v.* Walker, 5 Rich. N. S. 263; Light *v.* The State, 14 Kan. 489. See Moses *v.* Kearney, 31 Ark. 261. But in Board of Commissioners *v.* Hatch, 9 Nev. 357, it was held that the writ would not be granted to compel a county officer to remove from his office to another office assigned to him by the county authorities, since an action of ejectment was the appropriate remedy. And see as to the effect of delay in an application for mandamus to county officers to remove their books and records to a new location of the county seat, Golden *v.* Elliot, 13 Kan. 92.

[5] Maxey *v.* Mack, 30 Ark. 472.

[6] State *v.* Marston, 6 Kan. 524. See also State *v.* Stevens, 23 Kan. 456.

the laws of the state afford a plain and ample remedy for contesting elections, an elector seeking to avoid an election for the removal of the county seat must pursue the statutory remedy, and the validity of such an election will not be tested by proceedings in mandamus to compel the removal of county offices.[1] And the writ has been refused to compel the removal of county records to a place claimed to be the relocation of a county seat, when the notice of the election upon the question of removal was insufficient and not conformable to the law, so that the question was not fairly submitted to the electors.[2]

V. Ministerial Officers.

§ 80. The general rule stated.
81. The rule applied to clerks of court.
82. When clerk may be required by mandamus to issue execution.
82 *a*. Report of fees; record of meeting.
83. Mandamus lies to recorders of deeds.
84. May be granted to compel issuing of patents for lands.
85. Granted to compel surrender of exempted property levied upon under execution.
86. Where granted to compel issue of bank notes; and of railway-aid bonds.
87. Lies to compel assessment of lands for taxes; and for assignment of tax-sale certificates; and for issuing of tax deed.
88. When issued to compel granting of licenses.
89. When granted for recovering payment of money; return to appellate tribunal.
90. Lies to strike name from jury list.
91. Contracts for public works; rights of lowest bidder; the doctrine in Ohio.
92. Mandamus not granted in behalf of lowest bidder.
93. Not granted where contract is already awarded.
94. The general rule illustrated.
95. When refused against postmaster for publication of letter list.

[1] State *v.* Stockwell, 7 Kan. 98. But see, *contra*, State *v.* Saxton, 11 Wis. 27.

[2] People *v.* Hamilton Co. 3 Neb. 244.

96. Limitations upon the granting of mandamus to ministerial officers.
97. Not granted where ministerial officers are entrusted with discretionary powers.
98. Jurisdiction of the federal courts over ministerial officers.
99. Judicial power of United States over its officers not denied, but not conferred upon circuit courts.

§ 80. Most public officers, whatever the nature of their office, or from whatever source they derive their * 66 authority, are entrusted with the performance of certain duties concerning which they are vested with no discretionary powers, and which are either positively imposed upon them by virtue of express law, or necessarily result from the nature of the office which they fill. These duties, being unattended with any degree of official discretion, are regarded as ministerial in their nature, and the officers at whose hands their performance is required are, as to such duties, ministerial officers. The distinction between obligations of this nature, and those calling for the exercise of judicial discretion and some degree of judgment is obvious. It is a distinction frequently noticed throughout these pages, and in some of its many forms it is perpetually recurring in any attempt to analyze the principles underlying the law of mandamus. And while, as we have already seen and shall hereafter see, the courts have steadily refused to lend their extraordinary aid by mandamus to control in any degree the exercise of official discretion, wherever vested, yet as to official duties of a ministerial character, unattended with the exercise of any degree of discretion, and absolute and imperative in their nature, the law is otherwise. And it may be asserted as a rule of universal application, that in the absence of any other adequate and specific legal remedy, mandamus will lie to compel the performance of purely ministerial duties, plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers. Or, in other words, wherever a specific duty is required by law of a particular officer, unattended

with the exercise of any degree of official judgment or
* 67 element of discretion, and on the performance of which individual rights depend, mandamus is the appropriate remedy for a failure or refusal to perform the duty.[1]

§ 81. The rule that mandamus lies to ministerial officers to compel the performance of purely ministerial duties, is frequently applied to cases where the relief is sought against clerks of courts to require the performance of their official duties. And in as far as these officers are vested with ministerial functions, involving the exercise of no discretion or judgment, mandamus is the appropriate remedy to set them in motion.[2] Thus, the receiving and filing a sheriff's bond and administering the oath of office by the clerk of a court,

[1] Kendall v. The United States, 12 Pet. 524; Citizens Bank of Steubenville v. Wright, 6 Ohio St. 318; People v. Commissioner of State Land Office, 23 Mich. 270; North Western N. C. R. Co. v. Jenkins, 65 N. C. 173; Queen v. Southampton, 1 Best & Smith, 5; State v. Wrotnowski, 17 La. An. 156; State v. Barker, 4 Kan. 379; State v. Magill, Ib. 415; People v. Perry, 13 Barb. 206; People v. Taylor, 45 Barb. 129; People v. Miner, 37 Barb. 466; Silver v. The People, 45 Ill. 225; Strong's case, Kirby, 345; State v. Meadows, 1 Kan. 90; Simpson v. Register of Land Office, Ky. Dec. (2nd edition), 217; People v. Collins, 7 Johns. Rep. 549; People v. Canal Appraisers, 73 N.Y. 443; People v. Shearer, 30 Cal. 645; Hempstead v. Underhill's Heirs, 20 Ark. 337; Mitchell v. Hay, 37 Geo. 581; People v. Loucks, 28 Cal. 68; People v. Gale, 22 Barb. 502; People v. Fletcher, 2 Scam. 482; Attorney General v. Lum, 2 Wis. 507; Fowler v. Peirce, 2 Cal. 165; People v. Brooks, 16 Cal. 11; Danley v. Whiteley, 14 Ark. 687; State v. Bordelon, 6 La. An. 68; Turner v. Melony, 13 Cal. 621; Bryan v. Cattell, 15 Iowa, 538; State v. Gamble, 13 Fla. 9; State v. Secretary of State, 33 Mo. 293; People v. Smith, 43 Ill. 219; *Ex parte* Carnochan, Charlt. 216; *Ex parte* Selma & Gulf R. Co. 46 Ala. 423; State v. Draper, 48 Mo. 213; Black v. Auditor of State, 26 Ark. 237; People v. Supervisors of Otsego, 51 N. Y. 401; State v. Brown, 28 La. An. 103; State v. Burke, 33 La. An. 969; Mau v. Liddle, 15 Nev. 271; Robinson v. Rogers, 24 Grat. 319. And in Louisiana it is held that mandamus will only lie against a public officer when there is a specific ministerial duty imposed upon him by law. State v. Dubuclet, 27 La. An. 29; State v. Clinton, 27 La. An. 429; State v. Board of Liquidators, 27 La. An. 660; State v. Dubuclet, 28 La. An. 85; State v. Johnson, 28 La. An. 932.

[2] *Ex parte* Carnochan, Charlt. 216; People v. Gale, 22 Barb. 502; People v. Fletcher, 2 Scam. 482; Attorney General v. Lum, 2 Wis. 507; People

these duties being required of him by law, are considered, not as judicial, but simply ministerial duties, which the clerk may be required by mandamus to perform.[1] And where the clerk has no discretion with reference to the approval of official bonds, other than that of determining the sufficiency of the surety, the writ has been allowed, notwith- * 68 standing another person fills the office *de facto* and is wrongfully exercising its functions.[2] But where the clerk is vested with powers of a quasi-judicial nature as to the approval of bonds of county officers, the rule is otherwise, and in such case mandamus will not lie to compel the approval.[3]

§ 82. While the authorities are not altogether free from doubt as to the right of a judgment creditor to compel the clerk of a court by mandamus to issue an execution upon his judgment, the true test to be applied in such cases seems to be, whether the remedy against the clerk by action at law for a refusal to perform his duty is sufficient to give full redress to the party injured. And where it is held that an action at law against the clerk for damages upon his bond, or a motion in the proper court, will afford ample relief to the judgment creditor, the courts will withhold relief by mandamus.[4] On the other hand, notwithstanding the existence of a remedy by action against the clerk upon his official bond for damages, if such remedy be inadequate to procure for the party aggrieved the specific relief to which he is entitled, mandamus will lie.[5] Thus, the writ will go to the clerk of a court commanding him to issue a writ of assistance in aid of an order of the court for the delivery of particular property.[6] So where plaintiff in an action for the recovery of real property obtains a judgment entitling him to a writ of *habere facias possessionem*, but the

v. Loucks, 28 Cal. 68; Gulick *v.* New, 14 Ind. 93; Moore *v.* Muse, 47 Tex. 210.

[1] People *v.* Fletcher, 2 Scam. 482.

[2] Gulick *v.* New, 14 Ind. 93.

[3] Swan *v.* Gray, 44 Miss. 393.

[4] Goodwin *v.* Glazer, 10 Cal. 333; Fulton *v.* Hanna, 40 Cal. 278.

[5] People *v.* Loucks, 28 Cal. 68; Attorney General *v.* Lum, 2 Wis. 507.

[6] Attorney General *v.* Lum, *supra*.

clerk of the court refuses to issue such writ, an appropriate case is presented for relief by mandamus, since an action at law upon the bond of the clerk for damages would be manifestly inadequate.[1] And the writ has been allowed to compel a clerk to issue a citation in a cause,[2] as well as to issue an execution or the appropriate process to carry into effect a judgment of the court.[3] So, too, it has been granted by the supreme court of a state to compel the clerk of an inferior court to make out and transmit to the supreme court a * 69 transcript of the record in a cause determined in the court below, where the plaintiff has sued out a writ of error, *in forma pauperis*, in the higher tribunal.[4] But in all cases where the writ is sought to compel a clerk to issue an execution, it should be shown that application for relief was first made to the court in which the judgment was rendered, and that such court has refused to act.[5] And the writ will not go commanding a clerk to issue an order for a sale under a judgment, after the expiration of the statutory period of limitation, beyond which a judgment becomes dormant until revived by due process of law, since all proceedings under such judgment are void until it has been revived.[6]

§ 82 *a*. Mandamus also lies to compel a county clerk to make a report of all fees received by him by virtue of his office, when the making of such report is a duty required of him by law.[7] So the duty of a town clerk to record the proceedings of a town meeting as declared by the moderator of such meeting being purely a ministerial duty, involving the exercise of no judicial discretion, mandamus will lie to compel the clerk to amend or correct his records in such manner as to correspond with the facts.[8]

§ 83. Officers entrusted with the recording of deeds are

[1] People *v.* Loucks, 28 Cal. 68.

[2] *Ex parte* Carnochan, Charlt. 216.

[3] People *v.* Gale, 22 Barb. 502; Moore *v.* Muse, 47 Tex. 210.

[4] Rodgers *v.* Alexander, 35 Tex. 116.

[5] Compton *v.* Airial, 9 La. An. 496.

[6] State *v.* McArthur, 5 Kan. 280.

[7] State *v.* Whittemore, 12 Neb. 252.

[8] Hill *v.* Goodwin, 56 N. H. 44. See Bell *v.* Pike, 53 N. H. 473.

treated as ministerial officers within the meaning of the rule, and properly subject to the writ.[1] Thus, mandamus lies to a register of deeds to compel him to record a deed left with him for that purpose,[2] or to enter upon the records satisfaction of a mortgage.[3] So the writ will go commanding a recorder of deeds to permit access to his books and records by a person properly entitled thereto.[4] So, too, the register of a state land office may be required by mandamus to receive and register a plat and certificate of the survey of lands.[5] And where, by an act of legislature, a portion of one county is annexed to another, the register of deeds of the latter county is entitled to the aid of a mandamus, to compel the same officer in the former county to permit him to transcribe the records of his county, in as far as they affect real estate in the portion thus annexed.[6]

§ 84. The writ will go to the commissioner of a state land office requiring him to issue patents for certain swamp lands appropriated to a county by an act of legislature for the construction of a public road, the duty of the officer being treated as a ministerial one.[7] And a state land agent, * 70 as to duties in passing upon conflicting claims to lands, which are ministerial in their character, may be controlled by mandamus, although in proceedings for the writ in such case, the court will not permit the rights of third parties to be affected, any farther than they are necessarily and incidentally affected in determining the duties of the officer.[8]

§ 85. Where an officer has levied upon property in satis-

[1] Strong's case, Kirby, 345; People v. Miner, 37 Barb. 466; Silver v. The People, 45 Ill. 225.

[2] Strong's case, Kirby, 345; *Ex parte* Goodell, 14 Johns. Rep. 325. But the writ will not go to require a recorder of deeds to deliver a deed which he has not received in his official capacity, and which he holds in escrow. People v. Curtis, 41 Mich. 723.

[3] People v. Miner, 37 Barb. 466.

[4] Silver v. The People, 45 Ill. 225.

[5] Simpson v. Register of Land Office, Ky. Dec. (2nd edition), 217.

[6] State v. Meadows, 1 Kan. 90.

[7] People v. Commissioner of State Land Office, 23 Mich. 270.

[8] Hempstead v. Underhill's Heirs, 20 Ark. 337.

vided, either by constitution, or by legislation, that certain contracts or services to be rendered the public, such as public printing, the erection of public buildings, and other kindred works of public improvement, shall be let to the lowest responsible bidder giving adequate surety, the details of the advertising, awarding of contracts, amount of surety required, and other matters of like nature being generally regulated by express legislation. With reference to this class of * 72 contracts and the duties of the officers entrusted with awarding them, the doctrine has been broadly asserted in Ohio, that where the bidder for the work has complied with all the requirements of the law, and his proposal is for the lowest price and is in conformity with law, he is entitled to the contract, and it is the imperative duty of the officers to award it accordingly, the duty being of a ministerial nature and hence subject to coercion by mandamus, even though the contract may have already been awarded to another bidder.[1] But even in Ohio the decisions are far from harmonious, and the rule which they have attempted to establish has been so hedged about by limitations and conditions as to be of but little force. Thus, it has been held that the writ would not lie in behalf of the lowest bidder for public printing, to compel the commissioners to award him the contract for the printing, which had already been awarded by mistake to a higher bidder, where the party aggrieved had been guilty of a long and unexplained delay in seeking relief, and where he failed to show how much lower his bid was than that of the person receiving the contract.[2] Nor will the jurisdiction be exercised in favor of one claiming to be the lowest bidder, who does not show a clear, legal right on his own part, and a plain dereliction of duty on the part of the officers.[3] And

[1] Farman v. Commissioners of Darke Co. 21 Ohio St. 311. And the same doctrine has been contended for in New York, where no award had yet been made of the contract. See People v. Contracting Board, 46 Barb. 254.

[2] State v. Commissioners of Printing, 18 Ohio St. 386.

[3] State v. Commissioners of Ham-

where the law requires competing bidders for contracts for works of public improvement to give a good and sufficient bond, to the acceptance of the officers or commissioners entrusted with letting the contracts, and in the exercise of their discretionary powers such officers have rejected the bond, mandamus will not go to compel them to award the contract to the bidder whose bond they have rejected.[1] So before the writ will go to compel the awarding of a contract to one claiming to be the lowest bidder, he must show that all the requirements of the law under which the proposal was made have been substantially complied with.[2]

§ 92. The better doctrine, however, as to all cases of this nature, and one which has the support of an almost uniform current of authority, is that the duties of officers * 73 entrusted with the letting of contracts for works of public improvement to the lowest bidder, are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond control of the courts by mandamus.[3] And the true theory of all statutes requiring the letting of such contracts to the lowest bidder, is that they are designed for the benefit and protection of the public, rather than for that of the bidders, and that they confer no absolute right upon a bidder to enforce the letting of the contract by mandamus, after it has already been awarded to another.[4] And where a board of commissioners for the erection of a public building are required by

ilton Co. 20 Ohio St. 425. And see American Clock Co. v. Commissioners of Licking Co. 31 Ohio St. 415; People v. Commissioners of Buffalo Co. 4 Neb. 150.

[1] Boren v. Commissioners of Darke Co. 21 Ohio St. 311.

[2] State v. Barnes, 35 Ohio St. 136.

[3] State v. Board of Education of Fond du Lac, 24 Wis. 683; People v. The Contracting Board, 27 N. Y. 378; Same v. Same, 33 N. Y. 382; People v. Croton Aqueduct Board, 26 Barb. 240; Same v. Same, 49 Barb. 259; People v. Fay, 3 Lansing, 398; Free Press Association v. Nichols, 45 Vt. 7; Hoole v. Kinkead, 16 Nev. 217; Commonwealth v. Mitchell, 82 Pa. St. 343. And see State v. Commissioners of Licking Co. 26 Ohio St. 531.

[4] State v. Board of Education of Fond du Lac, 24 Wis. 683; Commonwealth v. Mitchell, 82 Pa. St. 343.

law to let the contract to the lowest responsible bidder, they are regarded as vested with powers partaking of a judicial nature in determining the responsibility of bidders. Where, therefore, they have acted in good faith and have accepted a bid which they regard as that of the lowest responsible bidder, they can not be compelled by mandamus to let the contract to a lower bidder. The duties of such commissioners being judicial rather than ministerial, their action, when had in good faith and in the absence of fraud, will not be controlled by the courts.[1] In all such cases, the spirit rather than the * 74 strict letter of the law requiring the work to be let to the lowest bidder should be kept in view. And where the right of the officers to enter into the contract is itself somewhat doubtful, mandamus will not lie.[2] Nor does the mere issuing of proposals by officers entrusted with letting contracts, inviting bids for the performance of the work, without binding themselves to award the contract to the lowest bidder, create such an obligation on the part of the officers as to entitle the lowest bidder to the aid of a mandamus to obtain the contract. Especially is it ground for refusing the writ, in such a case, that the officers show that they are without the necessary appropriation to meet the expenditure required, and that they have materially changed the design and character of the work, so that the public interests require that it should be again advertised and the contracts let under proposals framed in accordance with such alterations.[3]

§ 93. It is important also to observe, in connection with the doctrine under discussion, that where public officers are entrusted by law with the duty of awarding contracts for work or services to be rendered the state, and are required by law to let the contract, after competition, to the person whose offer shall be most advantageous to the state, their authority in the matter is exhausted when they have made the award.

[1] Hoole v. Kinkead, 16 Nev. 217; State v. Commissioners of Shelby Co. 36 Ohio St. 326.

[2] People v. Fay, 3 Lansing, 398.

[3] People v. Croton Aqueduct Board, 49 Barb. 259.

They can not, therefore, be compelled by mandamus to examine other proposals and to enter into another contract for the same services, after they have already passed upon the matter and awarded the contract.[1]

§ 94. The authorities referred to in the notes to the preceding sections, leave no room for doubt as to the settled rule that the lowest bidder acquires no such rights by making his bid as to entitle him to the writ of mandamus, before the contract has actually been awarded him.[2] The powers conferred upon the boards or officers authorized to con- * 75 tract with the lowest bidder, necessarily involving the exercise of discretion, the general principle denying relief by mandamus to control the discretionary powers of public officers applies, and the courts refuse to interfere.[3] Upon similar principles the writ will be refused where it is sought to compel certain state officers to ap- * 76 prove of a contract awarded the relator for the construction of public works of the state.[4] Where, however, the relator has been awarded the contract for printing the laws of a state and the contract has been actually entered into, for the faithful performance of which he has given the required bond, he may by mandamus compel the secretary of state to furnish him with copies of the public * 77 laws for printing, notwithstanding the printing has been let to another under a subsequent law. In such a case the relator's rights are regarded as contract rights, and in as far as the subsequent law impairs their obligation, it is in-

[1] Free Press Association *v.* Nichols, 45 Vt. 7.

[2] See cases cited *supra*, and People *v.* Croton Aqueduct Board, 26 Barb. 240.

[3] People *v.* The Contracting Board, 27 N. Y. 378. And it has been held that the writ will not lie to compel municipal officers to approve of the security tendered for the faithful performance by a bidder of his proposed contract for public work, whereby an expenditure will be required larger than is necessary, and larger than would be incurred by awarding the contract to a lower bidder, who has substantially complied with the law. People *v.* Green, N. Y. Supreme Court, Special Term, 6 Chicago Legal News, 208.

[4] People *v.* The Canal Board, 13 Barb. 432.

valid and constitutes no bar to relief by mandamus.[1] And when a board of state auditors are required by law to take proceedings for publishing the reports of the supreme court of the state, mandamus will lie to set them in motion.[2]

§ 95. Mandamus will not lie from a district court of the United States to the postmaster of a city, to compel him to publish the list of letters uncalled for in the newspaper having the largest circulation, as required by law. The granting of the writ for such a purpose would be the exercise of an original jurisdiction, and the federal courts have no power to interfere by mandamus, except when the writ is necessary to the proper exercise of a jurisdiction previously acquired.[3]

§ 96. While the discussion of the law of mandamus to ministerial officers thus far, has shown the jurisdiction to be well established to enforce the performance of public duties plainly incumbent by law upon such officers, it is nevertheless limited to cases where the officer is legally and fully empowered to perform the mandate of the court. And the writ will not go to command the performance of an official act or duty in advance of the time when it is actually required by law, since the courts will not presume that public officers will refuse the performance of their duties at the proper time.[4] Nor will the writ issue in any event to compel a ministerial officer to perform a duty required of him by a statute which is decided to be void.[5] Nor will mandamus lie to a ministerial officer to enforce obedience to an order of an inferior court, especially where a remedy by indictment exists against the officer for disobedience.[6]

§ 97. It sometimes happens that officers whose general functions are of a ministerial nature, are entrusted by law

[1] State v. Barker, 4 Kan. 379. And see Same v. Same, Ib. 435.

[2] People v. Board of State Auditors, 42 Mich. 422.

[3] United States v. Smallwood, 1 Chicago Legal News, 321, decided in U. S. District Court for Louisiana.

[4] City of Zanesville v. Auditor, 5 Ohio St. 589.

[5] State v. Tappan, 29 Wis. 664; State v. Jumel, 32 La. An. 60.

[6] King v. Bristow, 6 T. R. 168.

with the performance of duties of a quasi-judicial character, requiring of the officer the exercise of his best * 78 judgment and discretion. In such cases the courts are guided by the nature of the duty, rather than the functions of the officer at whose hands its performance is required, and in conformity with the general principle denying the aid of mandamus to control the exercise of official judgment and discretion, they will refuse to interfere to command the performance of the duty. For example, where a board of county commissioners are required by law to appoint suitable persons as collectors of taxes for the different towns and wards of their county, the duty of making such appointments is treated, not as a ministerial duty, but as one which calls for the exercise of a discretion closely allied to judicial, and with the exercise of which the courts will not interfere by mandamus.[1]

§ 98. It only remains to notice those cases where, although the duty sought to be coerced is purely of a ministerial character, unattended with the exercise of any official discretion, relief by mandamus is withheld on account of some defect or want of jurisdiction in the court whose aid is sought. In this country such cases are not infrequent, owing to our peculiar system of state and federal courts. As regards the power of the circuit courts of the United States by the writ of mandamus, under the judiciary act of 1789, it is held that the jurisdiction is confined exclusively to cases where it is necessary for the exercise of their general jurisdiction and powers.[2] In other words, circuit courts are authorized to use the writ only as ancillary to a jurisdiction already acquired, and it can not be used to confer or create a jurisdiction which they do not otherwise possess.[3] These courts, therefore, under the act of 1789, can not by mandamus compel the performance of ministerial duties by the officers of the United States, where

[1] Commonwealth v. Perkins, 7 Pa. St. 42.

[2] McIntire v. Wood, 7 Cranch, 504; Bath County v. Amy, 13 Wal. 245; Graham v. Norton, 15 Wal. 427.

[3] Bath County v. Amy, *supra*.

such duties are not in aid of the exercise of their existing jurisdiction. Hence they will not grant the writ to compel the register of a land office to issue a certificate of purchase for lands, although the duty is purely ministerial.[1] Nor
* 79 will the state courts be allowed by mandamus to control the action of ministerial officers of the United States, and the writ will not lie from a state court to compel the register of a United States land office to issue a certificate of purchase for lands, since such an office, being created by the government of the United States, can only be controlled by the power which created it.[2]

§ 99. It is not, however, to be inferred from the
* 80 authorities cited in the preceding section, that the power of issuing the writ of mandamus to an officer of the United States, commanding him to perform a duty required by law, is beyond the scope of the judicial power of the government under the constitution. On the contrary, the cases upon this subject, so far from denying the judicial power of the United States over its own officers, expressly recognize its existence, while they deny that the whole of that power has been confided by law to the circuit courts. In other words, the power is regarded as a dormant one, not yet called into action or vested in the courts.[3]

[1] McIntire v. Wood, 7 Cranch, 504.

[2] McClung v. Silliman, 6 Wheat. 598.

[3] See McIntire v. Wood, 7 Cranch, 504; McCluny v. Silliman, 2 Wheat. 369; McClung v. Silliman, 6 Wheat. 598; Kendall v. The United States, 12 Pet. 524; Marbury v. Madison, 1 Cranch, 49.

VI. Auditing and Fiscal Officers.

§ 100. Outline of the jurisdiction.
101. Ministerial duties of auditing officers subject to mandamus.
102. Discretionary powers not subject to the writ.
103. Salary of disputed office.
104. Mandamus lies to compel drawing of warrant for claim allowed.
105. Lies to compel drawing of warrant for salary.
106. Material furnished under contract; illegal contract.
106 *a*. Auditing board must first be applied to; remedy at law.
107. Affixing official seal to warrant; successor in office liable.
108. Incumbent *de facto* entitled to mandamus for salary.
109. Writ refused for auditing accounts of public officer.
110. Granted to compel certifying of account; payment to wrong person.
111. Salary or claim must be authorized by law.
112. Writ granted to compel payment of warrants drawn upon fiscal officers.
113. Granted for payment of warrant for salary due; incumbent *de facto* entitled to the remedy.
114. Rule where warrant is payable out of particular fund.
115. Discretion of fiscal officer not controlled by mandamus; excess of jurisdiction, revocation of warrant.
116. Limitations upon the general rule.
116 *a*. Delivery of money compelled; personal judgment against officer improper.
117. Officer must have funds in possession.

§ 100. The duties of public officers entrusted with the auditing and payment of accounts for services ren- * 81 dered the public, salaries of officers, and other obligations of a kindred nature, may be appropriately considered in this connection, and form an important feature of the general jurisdiction of the courts by mandamus over public officers. We have elsewhere considered the principles governing the interference by this writ, to compel the auditing and payment of claims and demands against municipal corporations,[1] and we have here to consider the use of the writ as applied to

[1] See Chap. V, Subdivision II, *post*.

other than municipal officers, and more especially to the various state officers to whom is entrusted the duty of auditing and paying demands against the state.

§ 101. In as far as the duties of the class of officers under consideration are ministerial in their nature, and unconnected with the exercise of any especial discretion or judgment, they are properly subject to the control of the courts. And where the nature and amount of the services rendered the state are definitely fixed and ascertained, and the compensation therefor is fixed by law, the duty of auditing and allowing the account for such services becomes a mere ministerial act, the performance of which may be coerced by mandamus. Thus, the writ will go to the comptroller of public accounts of a state, requiring him to audit the account of a member of the state legislature for his services rendered in that capacity, since, the nature of the services as well as their amount being definitely fixed, and the compensation being prescribed by law, the comptroller is vested with no official discretion in the matter, and may be compelled by mandamus to perform his plain duty.[1] Nor is it regarded as a sufficient objection to granting the writ in such a case, that it affords an indirect method of suing the state.[2] And such an officer may be required by the writ to correct a manifest error in his accounts, * 82 which has arisen from his erroneously pursuing a law which has been subsequently declared void.[3] In general, however, since a state can not be sued in its own courts without its own consent, the remedy by mandamus is not to be extended so as to become in effect a process against the state for establishing demands of an unliquidated nature, which properly fall within the cognizance of the legislature.[4]

§ 102. Where, however, auditing officers entrusted by law with the duty of passing upon and determining

[1] Fowler v. Peirce, 2 Cal. 165; People v. Brooks, 16 Cal. 11.

[2] Fowler v. Peirce, *supra*.

[3] People v. Bell, 4 Cal. 177.

[4] Swann v. Buck, 40 Miss. 291.

the validity of claims against a state, are vested with powers of a discretionary nature as to the performance of their duties, a different rule from that above stated prevails. In such cases, the fundamental principle denying relief by mandamus to control the exercise of official discretion applies, and the officers having exercised their judgment and decided adversely to a claimant, mandamus will not lie to control their decision, or to compel them to audit and allow a rejected claim. The remedy, if any, for such a grievance, must be sought at the hands of the legislature, and not of the courts.[1] And where a state comptroller is vested with certain discretionary powers in the adjusting and settlement of demands against the state, he can not be compelled to issue his warrant for the payment of a particular sum.[2] Nor will the writ go to compel an officer to audit a claim unless it is clearly his duty so to do.[3]

§ 103. Where there is an actual incumbent of an office, holding his position and exercising its functions under color of right, mandamus will not lie to the state auditor to compel him to audit the claim of another person for the salary of the office. In such case, it is a sufficient objection to relief by mandamus that a conflict of title is presented, which can only be determined by proceedings in quo warranto, and the auditor himself has no power to inquire into the regularity of the commission issued for the office, or to determine the disputed title.[4]

§ 104. The drawing of a warrant for the payment of a demand or claim which has been duly audited and * 83 allowed by the proper authority, is regarded as a duty of a purely ministerial nature and hence properly falling

[1] Auditorial Board *v.* Arles, 15 Tex. 72; Auditorial Board *v.* Hendrick, 20 Tex. 60; Towle *v.* The State, 3 Fla. 202; State *v.* Doyle, 38 Wis. 92; People *v.* Auditor of Colorado, 2 Col. 97.

[2] Green *v.* Purnell, 12 Md. 329.

[3] Drew *v.* Russell, 47 Vt. 250.

[4] State *v.* Moseley, 34 Mo. 375; Winston *v.* Moseley, 35 Mo. 146; State *v.* Thompson, 36 Mo. 70. And see State *v.* Draper, 48 Mo. 213; State *v.* Clark, 52 Mo. 508.

within the scope of mandamus. And wherever the demand has been definitely ascertained as prescribed by law, and the duty is plainly incumbent by law upon a particular officer of drawing his warrant upon the treasury for the amount due, a refusal to perform this duty will warrant the interposition of the courts by mandamus.[1] Thus, the writ will go to the auditor of public accounts of a state, to draw his warrant for a particular amount appropriated by act of legislature for a particular purpose, since his duty in the premises involves the exercise of no discretion and is merely ministerial in its nature.[2] So where the claim is not disputed and it is the duty of the officer to draw his warrant upon the fund out of which it is payable, the duty being peremptory and the officer having no discretion in the premises, mandamus is the appropriate remedy.[3] Nor is the jurisdiction by mandamus, in this class of cases, ousted by the fact that the claimant has by law the privilege of suing the state, if dissatisfied with the decision of the auditing officer, since this privilege, or submission on the part of the state to be sued, does not take away the remedy by mandamus as to acts of a purely ministerial nature.[4]

§ 105. Frequent applications of the rule as above stated occur in cases of salaries due to public officers, and in cases of this nature, where the amount of the salary is definitely fixed and appropriated by law, the drawing of the warrant upon the public treasurer is unattended with the exercise of any official discretion, and may very properly be coerced by mandamus.[5] And in proceedings for this purpose, the

[1] Danley v. Whiteley, 14 Ark. 687; State v. Bordelon, 6 La. An. 68; Turner v. Melony, 13 Cal. 621; Bryan v. Cattell, 15 Iowa, 538; State v. Gamble, 13 Fla. 9; State v. Secretary of State, 33 Mo. 293; People v. Smith, 43 Ill. 219; People v. Secretary of State, 58 Ill. 90; Nichols v. The Comptroller, 4 Stew. & Port. 154; Babcock v. Goodrich, 47 Cal. 488; Smith v. Strobach, 50 Ala. 462; Auditor v. Haycraft, 14 Bush, 284; People v. Schuyler, 79 N. Y. 189.

[2] State v. Bordelon, 6 La. An. 68.

[3] Fisk v. Cuthbert, 2 Mont. 593.

[4] Danley v. Whiteley, 14 Ark. 687.

[5] State v. Gamble, 13 Fla. 9; Bryan v. Cattell, 15 Iowa, 538. And

courts will not ordinarily inquire into the eligibility of the officer to the office whose salary he seeks to draw.[1] If, however, there be no other incumbent or claimant of the office, it would seem to be proper for the court to determine whether the appointment under which relator claims was * 84 void.[2] But the writ will not go to compel the drawing of a warrant in payment of a salary unless it is shown that there is money appropriated to such purpose, out of which the payment can be made.[3]

§ 106. Where it is the plain and unmistakable duty of a state auditor to draw his warrant upon the treasurer of the state, for the payment of money due for materials furnished the state under contract with the proper officers, and it is also the duty of the treasurer to countersign such warrant, and deliver it to the person properly entitled thereto, this duty may be coerced by mandamus, regardless of whether there is money in the treasury out of which the warrant may be paid. Such a case is plainly distinguished from that of mandamus to compel the actual payment of the money, where it is conceded to be a sufficient objection to the interference, that there are no funds in the treasury out of which the payment can be made. And the writ will lie, in the case under consideration, as to materials furnished to and received by the state under the contract, even though the law was not complied with in awarding the contract. Where, however, there has been a departure from the requirements of the statute in letting the contract, and the legislature of the state has, by resolution, refused to go on with the contract in the future, mandamus will not be granted to compel the secretary of state to receive materials yet undelivered under the contract. In such case, while the state is regarded as having ratified

see Turner v. Melony, 13 Cal. 621; Nichols v. The Comptroller, 4 Stew. & Port. 154; People v. Board of Police, 75 N. Y. 38; State v. Starling, 13 S. C. 262; State v. Clinton, 28 La. An. 47; State v. Jumel, 30 La. An. 339, 861.

[1] Turner v. Melony, 13 Cal. 621.

[2] State v. Gamble, 13 Fla. 9.

[3] State v. Jumel, 31 La. An. 142.

the contract, as to materials already received and accepted thereunder, it has the undoubted right to refuse to proceed further under the contract.[1]

§ 106 *a*. Mandamus will not lie against the clerk of a board of auditing officers to compel him to draw a warrant for the amount of a claim which has been audited and allowed by such board, when the claimant has not applied to the board itself for such warrant. In such case the relief is refused upon the ground that the courts will not interfere with the performance of merely clerical duties of another tribunal of a judicial nature, until that tribunal has refused to command its own ministerial agent to perform the duty in question.[2] And the writ has been refused when sought to compel an auditing officer to strike out of the account of the relator as a public officer certain items, the refusal being based upon the existence of an ample remedy at law.[3]

§ 107. Mandamus is also the appropriate remedy to compel the performance of a purely ministerial act, necessary to the legality of a warrant for the payment of money due from the public, such as affixing an official seal to the warrant. And where the duty of affixing the seal is imposed upon the officer by law, there being no other adequate remedy, mandamus lies for its performance. In such case the jurisdiction may be exercised against the successor of the officer whose duty it originally was to affix the seal, the duty being
* 85 regarded as a continuing one, incumbent upon the officer in his official capacity and not as an individual.[4]

§ 108. Where disputed questions arise as to the title to a public office, the incumbent *de facto* is regarded as vested by his commission with *prima facie* evidence of his right, and as entitled to the emoluments of the office until the state by a proper proceeding has revoked the authority with which it had previously invested him. Mandamus, therefore, lies

[1] People *v.* Secretary of State, 58 Ill. 90.

[2] Parker *v.* Hubbard, 64 Ala. 203.

[3] State *v.* Brewer, 61 Ala. 318.

[4] Prescott *v.* Gonser, 34 Iowa, 175.

in such case to a state auditor, to compel him to draw his warrant upon the treasurer for payment of the salary due the incumbent *de facto*, notwithstanding the pendency of proceedings in quo warranto, instituted by the attorney general of the state, to test the title to the office.[1]

§ 109. In England, mandamus does not lie in behalf of a public officer, entrusted with the custody and disbursement of public funds, to compel the commissioners of the treasury to direct an examination and auditing of his accounts with the government. The relief is refused in such case on the ground that, while the officer may have a moral right to insist upon the auditing of his accounts, yet he has no such express legal right as to lay the foundation for a mandamus, in the absence of any statute making it the duty of the commissioners to audit his accounts.[2]

§ 110. In conformity with the principles already established, mandamus will lie to a secretary of state, requiring him to certify the account of the register of state lands for services rendered, where this duty is incumbent by law upon the secretary, and he is vested with no supervisory control over the register and no discretion as to the performance of the latter's duties.[3] And it is to be observed that where the custodian of public funds pays them to the wrong person, simulating the real claimant, and negligently or carelessly fails to assure himself of the identity of the payee with the real claimant, the state is still liable for the amount really due, and mandamus will lie to compel the auditor to draw his warrant for the amount, and the treasurer to * 86 make payment of the same. Thus, the writ will go to a state auditor, to draw his warrant for the amount of interest due on state bonds to a holder thereof, and to the treasurer

[1] State *v.* Clark, 52 Mo. 508. See also State *v.* Draper, 48 Mo. 213; Same *v.* Same, 50 Mo. 353.

[2] *Ex parte* Edmunds, 25 L. T. R. N. S. 705.

[3] State *v.* Secretary of State, 33 Mo. 293.

to pay the same, notwithstanding a previous payment to a person not entitled thereto.[1]

§ 111. It is to be borne in mind that the jurisdiction by mandamus in this class of cases is dependent upon whether the demand or claim is one definitely fixed or authorized by law. And a state comptroller of public accounts will not be directed by the writ to draw his warrant upon the state treasurer, in payment of a salary which is not specifically authorized by law.[2] Nor will the writ issue to a state auditor, to compel him to draw his warrant upon the treasury, in payment of a claim where no evidence was shown as to the value of the services rendered, and no law authorizing the payment, especially where the legislature of the state has already passed upon the claim and allowed a portion thereof, which has been paid.[3]

§ 112. Upon principles similar to those governing the courts in extending relief by mandamus to compel the drawing of warrants upon the public treasury, for demands definitely ascertained and legally due, will they interfere to compel payment of such warrants by the custodian of the public funds on whom they are drawn. The act of payment in such cases, being a naked, ministerial act, involving no element of discretion, a refusal of the proper officer to make the payment in accordance with the warrant or order, drawn upon him by the proper authority, will justify the interference of the courts by mandamus.[4] Thus, the writ
* 87 will go to a state treasurer commanding him to make payment of warrants drawn upon him by the auditor of state, the warrants giving the persons holding them a clear

[1] People *v.* Smith, 43 Ill. 219.

[2] Chisholm *v.* McGehee, 41 Ala. 192.

[3] Swann *v.* Work, 24 Miss. 439.

[4] Hommerich *v.* Hunter, 14 La. An. 221; State *v.* Bordelon, 6 La. An. 68; *Ex parte* Selma & Gulf R. Co. 46 Ala. 423; State *v.* Staley, 38 Ohio St. 259; State *v.* Draper, 48 Mo. 213; Black *v.* Auditor of State, 26 Ark. 237; Needham *v.* Thresher, 49 Cal. 392; Bank of California *v.* Shaber, 55 Cal. 322; State *v.* Dubuclet, 26 La. An. 127. See also State *v.* Cardozo, 5 Rich. N. S. 297.

right to the amounts indicated, and there remaining only the ministerial act of payment.[1] And in such case, the treasurer can not withhold payment on the ground that the amount claimed is not due according to his construction of the law.[2] So where the court has decided that a specific amount is due the relator from a particular fund, as a school fund, the commissioner in charge of that fund may be required to make the payment.[3]

§ 113. The payment of a salary due to a public officer affords a good illustration of the general rule as here stated, the relator being plainly entitled to the amount fixed by law as compensation for his services.[4] And an officer *de facto*, in possession of the office and exercising its functions under color of right, is entitled to the aid of mandamus to compel payment of his salary, notwithstanding there is a conflicting claimant to the office.[5] And upon such application the court will not investigate the actual legal title to the office.[6]

§ 114. Where a particular warrant upon the treasurer of a state, for the payment of money due from the state, is made payable out of a particular fund, upon application for mandamus against the treasurer to compel the payment of the warrant, it should be shown that there was money in the hands of the treasurer at the time of presenting the warrant, applicable to its payment. And in such case it is not a sufficient compliance with the rule to allege that the money was in the hands of the treasurer when the warrant was drawn.[7] Nor will the writ go to compel the payment of warrants which are payable out of a particular fund, when the fund is

[1] *Ex parte* Selma & Gulf R. Co. 46 Ala. 423; Hommerich *v.* Hunter, 14 La. An. 221.

[2] Hommerich *v.* Hunter, 14 La. An. 221.

[3] Hillis *v.* Ryan, 4 G. Greene, 78.

[4] Black *v.* Auditor of State, 26 Ark. 237.

[5] State *v.* Draper, 48 Mo. 213. And see Same *v.* Same, 50 Mo. 353; State *v.* Clark, 52 Mo. 508.

[6] State *v.* Draper, 48 Mo. 213. And see State *v.* Moseley, 34 Mo. 375; Winston *v.* Moseley, 35 Mo. 146; State *v.* Thompson, 36 Mo. 70.

[7] Huff *v.* Kimball, 39 Ind. 411. See also Dubordieu *v.* Butler, 49 Cal. 512.

insufficient for the payment of all outstanding warrants drawn against it, no priority being shown to exist.[1]

§ 115. While the duty of making payment of a * 88 demand definitely ascertained and legally due is, in itself, purely a ministerial act, and therefore, as we have just seen, a proper subject of control by mandamus, yet the rule is otherwise if the fiscal officer, entrusted with the duty of making payment, is also entrusted with powers of a discretionary nature in determining the propriety of the demands which he shall pay. In such case, the general principle forbidding the interference of the courts with the exercise of official discretion is allowed to prevail, and mandamus is refused. Thus, the writ will not lie against a state treasurer, commanding him to pay a demand against the state which he has refused, where it is made by law his duty to examine all claims against the public treasury, and where he is authorized to refuse payment of unjust or unreasonable claims, and where, in the exercise of these powers, he has passed upon and refused to allow the claim in question.[2] Nor will the writ be granted to compel the drawing of a warrant in payment of an award made by a board of officers, as to so much of the award as is in excess of the jurisdiction of the board; and in such case the relief will be limited to that portion of the demand which they are legally authorized to allow.[3] And since a warrant upon the treasury of the state for the payment of money is not in the nature of a contract with the person in whose favor it is drawn, but only a license or power authorizing the payment and subject to revocation while payment has not been made, mandamus will not go to compel payment of such a warrant after it has been revoked by the proper authority.[4]

§ 116. It is to be observed that the writ only issues to officers in custody of public funds, to compel the payment of

[1] State v. State Treasurer, 32 La. An. 177.

[2] Louisiana College v. State Treasurer, 2 La. 394.

[3] People v. Schuyler, 69 N. Y. 242.

[4] Fletcher v. Renfroe, 56 Ga. 674.

claims or demands which have been specifically authorized, or for which money has been appropriated, in due course of law. And mere contract relations between the claimant and the state, as to the amount of compensation to be paid for services rendered by the former, do not constitute such an appropriation of the public funds in the hands of the public treasurer, as to lay the foundation for a mandamus to compel the payment.[1] Nor will the writ go to a state treasurer, commanding the payment of a demand against the state, where it appears that the legislature has expressly forbidden such payment.[2] And it is important to observe, that the writ will not direct public officers or servants to make payment of demands against the public, in any other than the manner prescribed by law. For example, where the state has, by a resolution of the legislature, provided that the payment of certain bonds of the state shall be made in legal-tender currency, while upon their face the obligations call for payment in gold and silver coin, mandamus will not lie to compel payment of the bonds in coin, even though the court may be of opinion that the state has failed to meet its obligations and to comply with its contracts. The remedy for such a grievance must be sought in the legislature and not in the courts.[3]

§ 116 *a*. Mandamus will lie against the clerk of a court to compel him to deliver money which is in his official custody and to which the relator is entitled.[4] So where a school trustee has in his hands money belonging to a school fund, which it is his duty to pay over to the persons entitled to its custody, he may be compelled by mandamus to make such payment.[5] But in proceedings by mandamus against a public officer, to compel the payment of money, it is error to

[1] Weston *v.* Dane, 51 Me. 461.
[2] Bayne *v.* Jenkins, 66 N. C. 356.
[3] State *v.* Hays, 50 Mo. 34.
[4] State *v.* Cunningham, 9 Neb. 146.
[5] Johnson *v.* Smith, 64 Ind. 275.

render a personal judgment against the officer for the amount of the money in question.[1]

§ 117. It is always a complete objection to interfer-
* 89 ing by mandamus, that the granting of the writ would be nugatory, and in the case of fiscal officers against whom the writ is sought, to compel the auditing or payment of a public indebtedness out of a public fund, it is sufficient to show that there are no funds in the hands of the officer appropriated to that purpose, since the writ will not lie to compel the performance of an act which the officer is powerless to perform.[2]

VII. Executive Officers.

§ 118. Conflict of authority as to jurisdiction by mandamus over executive officers.
119. The writ granted to executive officers in some states.
120. The weight of authority opposed to the jurisdiction; reasons therefor.
121. Writ not granted to compel governor to issue commission; or to declare person elected.
122. Not granted to require performance of military duties by governor.
123. Not granted to compel governor to issue state bonds; or to deposit bill with secretary of state.
124. Writ does not lie from federal courts to governor of state.
124 *a*. Secretary of state, state treasurer, state auditor, jurisdiction exercised in Wisconsin.
124 *b*. Denied in Minnesota and Louisiana.
125. Refused against secretary of state to certify act of legislature.
126. Land commissioner or comptroller, not required to issue bonds to railway.
127. Rule as to heads of executive departments and cabinet officers of United States.
128. Limitation upon the rule.

[1] Rogers *v.* The People, 68 Ill. 154.

[2] Hayne *v.* Hood, 1 Rich. N. S. 16. And see Dodd *v.* Miller, 14 Ind. 433. See also People *v.* Secretary of State, 58 Ill. 90; Huff *v.* Kimball, 39 Ind. 411; State *v.* Jumel, 31 La. An. 142; Dubordieu *v.* Butler, 49 Cal. 512; State *v.* Halladay, 65 Mo. 76.

129. Rule as applied to secretary of the treasury.
130. Rule as to secretary of the navy concerning payment of naval pensions.
131. Rule as to commissioner of patents.
132. Patents for public lands.
133. Mandamus to sheriffs.
134. When granted to compel sheriff to make deed.

§ 118. The jurisdiction of the courts by mandamus over executive officers, including governors of * 90 states, heads of executive departments of the general government, and others of a kindred nature, has given rise to questions of much difficulty, and not a little conflict of authority has resulted from the efforts of the courts to apply the general principles of the law of mandamus to such cases. Especially is this true with reference to the control of the courts by mandamus over the official action of the governors of the various states, and upon no branch of the law of mandamus are the authorities more contradictory than upon this. And while, as to purely executive or political functions devolving upon the chief executive officer of a state, and as to duties necessarily involving the exercise of official judgment and discretion, the doctrine may be regarded as uncontroverted that mandamus will not lie,[1] yet as to duties of a ministerial nature and involving no element of discretion, which have been imposed by law upon the governor of a state, the authorities are exceedingly conflicting and, indeed, utterly irreconcilable. Upon the one hand, it is contended, and with much show of reason, that as to duties of this character, the general principle allowing relief by mandamus against ministerial officers should apply, and the mere fact of ministerial duties having been required of an executive officer, should not deter the courts from the exercise of their jurisdiction. Upon the other hand, it is held that under our structure of government, with its three distinct departments, executive, legislative, and judicial, each department being

[1] Miles v. Bradford, 22 Md. 170. And see State v. Chase, 5 Ohio St. 528; Tennessee & Coosa R. Co. v. Moore, 36 Ala. 371.

wholly independent of the other, neither branch can properly interfere with the duties of the other, and that as to the nature of the duties required of the executive department by law, and as to its obligation to perform those duties, it is entirely independent of any control by the judiciary. While the former theory has the support of many respectable authorities, and is certainly in harmony with the general principles underlying the jurisdiction as applied to * 91 purely ministerial officers, the latter has the clear weight of authority in its favor, and may be regarded as the established doctrine upon this subject. The importance of the subject, however, merits a more extended discussion, and it is proposed to consider both propositions somewhat in detail, together with the reasoning of the courts in support thereof.

§ 119. The courts of last resort in Ohio, Alabama, California, Maryland, North Carolina, Indiana and Montana, while conceding the complete independence of the governor of the state from judicial control, in the performance of his purely executive and political functions, have held that, as to ministerial duties incumbent by law upon the executive, and which might with equal propriety have been required at the hands of any other officer, the general principle prevails and mandamus will lie to compel the performance of such duties. Looking to the nature of the act to be performed, rather than to the general functions of the officer at whose hands it is required, and that act in no manner partaking of an executive or political character, and involving the exercise of no official discretion, the courts of these states have held that the executive character of the officer did not remove him from judicial control, and that a failure or neglect to perform a plain and imperative ministerial duty required of him by law, was sufficient foundation for interposing the extraordinary aid of a mandamus.[1] Thus, the writ has been

[1] State v. Chase, 5 Ohio St. 528; Tennessee & Coosa R. Co. v. Moore, 36 Ala. 371; Cotten v. Ellis, 7 Jones, 545; Magruder v. Swann, 25 Md.

recognized as the proper remedy to compel the governor of a state to issue a proclamation, in compliance * 92 with a statute, declaring that a banking association, having complied with the law in all respects, was entitled to

173; Groome *v.* Gwinn, 43 Md. 572; Chumasero *v.* Potts, 2 Mont. 242; Middleton *v.* Low, 30 Cal. 596; Harpending *v.* Haight, 39 Cal. 189; Gray *v.* The State, 72 Ind. 567. See also Baker *v.* Kirk, 33 Ind. 517. State *v.* Chase, 5 Ohio St. 528, was an application for a mandamus, upon the relation of a banking association to compel the respondent, as governor of Ohio, to issue his proclamation, as required by statute, announcing that the company was duly authorized to commence and carry on the business of banking. The section of the banking act relied upon in support of the application, provided that, upon its being properly certified to the governor that the banking company had complied with the provisions of the law and was entitled to commence business, the governor should, if satisfied that the law had in all respects been complied with, issue his proclamation, setting forth that the company was authorized to commence and carry on the business of banking. Although the mandamus was refused, on other grounds, the court held that as to purely ministerial acts devolving upon the executive of the state, he was amenable to the process of the courts by mandamus. Upon this point the court, BARTLEY, C. J., say: "The constitutional provision declaring that 'the supreme executive power of this state shall be vested in the governor,' clothes the governor with important political powers, in the exercise of which he uses his own judgment or discretion, and in regard to which, his determinations are conclusive. But there is nothing in the nature of the chief executive office of this state, which prevents the performance of some duties merely ministerial being enjoined on the governor. While the authority of the governor is supreme in the exercise of his political and executive functions, which depend on the exercise of his own judgment or discretion, the authority of the judiciary of the state is supreme in the determination of all legal questions involved in any matter judicially brought before it. Although the state can not be sued, there is nothing in the nature of the office of governor, which prevents the prosecution of a suit against the person engaged in discharge of its duties. This is fully sustained by the analogy of the doctrine of the Supreme Court of the United States, in the case of Marbury *v.* Madison, 1 Cranch Rep. 49. However, therefore, the governor, in the exercise of the supreme executive power of the state, may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of judicial power, yet in regard to a mere ministerial duty enjoined on him

begin the business of banking.[1] So mandamus has been granted to require a governor to draw his warrant upon the treasurer of the state for the payment of a salary due to a state officer.[2] So, too, the writ has been allowed commanding the governor of a state to sign and execute a patent for lands sold by the state, where the law regulating the sale of such lands had been complied with by the officers of the state and by the purchaser.[3] And where by statute the governor is required to authenticate as laws all bills which have passed both houses of the legislature, the act of authentication has been treated merely as a ministerial act, partaking in no manner of an executive character, which the law might with equal propriety have required of any other officer, and hence a duty whose performance might be coerced by mandamus.[4]

by statute, which might have been devolved on another officer of the state, and affecting any specific private right, he may be made amenable to the compulsory process of this court by mandamus. The official act of the governor in question, in regard to issuing the proclamation asked for, is a duty prescribed by statute, not necessarily connected with the supreme executive power of the state, ministerial in its nature, and a duty which might have been enjoined on some other officer. It is contended that this duty rests in the discretion of the governor, by virtue of the provision requiring that 'he shall, if he be satisfied that the law has, in all respects, been complied with, issue his proclamation,' etc. The facts connected with the organization of the company, and the other essential preparations preliminary to the commencement of the business of banking, are required to be certified to the governor; and on finding that the law has been complied with in these respects, the proclamation is required. The duty is imperative on his being satisfied of a given state of facts. It is his duty to look into the evidence presented to him, and act on a given state of facts. He has no uncontrollable power of judgment as to either the law or the facts. On his finding the existence of the requisite fact, the law is peremptory in requiring the performance of the duty. True it is, if the evidence presented be not clear and satisfactory as to the compliance with the requirements of the law, but leaves ground for doubt, the act is not authorized. The duty enjoined, therefore, although subject to a condition, is ministerial in its nature."

[1] State *v.* Chase, 5 Ohio St. 528.

[2] Cotten *v.* Ellis, 7 Jones, 545.

[3] Middleton *v.* Low, 30 Cal. 596.

[4] Harpending *v.* Haight, 39 Cal. 189. Mr. Justice WALLACE, pronouncing the opinion of the court, says, p. 212: * * * "And upon

So the duty of the chief executive of a state to issue commissions to the persons returned to him as elected to the various public offices in the state, has been held a * 94 mere ministerial duty, imposed upon the governor as preliminary to the qualification of the officers, which he is

principle it would seem that, if the petitioner has a vested right by law to have the bill in question authenticated, the mere circumstance that the person whose duty it is to direct the act to be performed is an officer, even the chief officer, of the executive department, and as such, in the discharge of other and important duties, should not either impair the right or embarrass its assertion. The duty to direct the authentication imposed upon the governor by the statute, might have been enjoined upon any other executive officer, and in such case would it be pretended that its performance could not be enforced? It might have been made part of the official duty of the secretary of state, independently of any direction to him by the governor, to affix the appropriate certificate to the bill; and in that case, would it be any answer to say that he was an executive officer, and as such invested with executive discretion and authority in reference to certain other matters not involved in this question? And if it be conceded that the governor, because he is chief of the executive department, enjoys for that reason an absolute immunity from all judicial process, even when his duty in the given instance is ministerial, and a citizen has a vested right to have it performed, may not the same exemption from judicial process be set up by other officers of the executive department? Would the attorney general, the controller, the treasurer, and the other great officers of state, by reason of their mere official rank, be beyond the reach of the process of the law in all cases, and not be compelled to perform any official act, no matter how distinctly enjoined upon them? And if the state officers of the executive department are to be clothed with this immunity, it must be remembered that the sheriffs, recorders, etc., in the several county organizations, are also members of the executive department, and upon what principle could one of them be compelled to perform his duty in any case? It seems to us that the assertion of such a doctrine would draw after it the most serious complication and confusion, both in public and private rights, and practically disrupt the whole fabric of government." In the case of *In re* Cunningham, 14 Kan. 416, mandamus was refused against the governor to compel the issuing of a patent for lands to a purchaser, upon the ground that no neglect or refusal to perform the duty was shown. But the opinion of the court would seem to indicate that they entertained no doubt of their jurisdiction to enforce the performance of an official duty by the governor.

imperatively required to perform, in order that the different departments of the government may be kept in motion, and mandamus has therefore been granted to compel the issuing of a commission by the governor.[1] And the canvassing of the returns of an election by a governor upon whom the duty is imposed, being regarded as a purely ministerial act, its performance has been required by mandamus.[2] So, again, it has been held, still having regard to the nature of the act to be performed, rather than to the character of the officer, that where a statute imposed upon the governor of a state the duty of drawing his warrant upon the treasurer for the payment of certain funds to a railway company, upon its performance of certain conditions, the duty was of a ministerial character and properly subject to control by mandamus.[3]

[1] Magruder v. Swann, 25 Md. 173.

[2] Chumasero v. Potts, 2 Mont. 242.

[3] Tennessee & Coosa R. Co. v. Moore, 36 Ala. 371. "By the constitution of this state," say the court, WALKER, J., "the powers of government are divided and distributed among three departments, the legislative, the executive, and the judicial. The governor, as the head of the second of these departments, is clothed with the 'supreme executive power of the state'; and in the discharge of those political functions attached to his office, which depend on the exercise of his own judgment or discretion, his determinations are conclusive. Any attempt on the part of the judiciary to control or direct him in the performance of executive duties, about which he has a discretion, and may exercise his own judgment, would be a manifest usurpation of power. But there is nothing in the nature of his office which can prevent the legislature from assigning to the governor the performance of some mere ministerial act, in regard to which he is not clothed with any discretionary power, his whole duty being that of simple obedience to the command of the legislature; and when this is done, the governor is to be viewed as merely a ministerial agent of the law; and if he fails or refuses to perform the act required of him, he is amenable to the law; and any person whose rights are dependent on the performance of such act may have redress by resorting to the proper legal remedy. * * While, therefore, it is true that, in regard to many of the duties which belong to his office, the governor has, from the very nature of the authority, a discretion which the courts can not control, yet in reference to mere ministerial duties imposed upon him by statute, which might have been devolved on another officer if the legislature had seen fit, and on the performance of which some

§ 120. While it may be conceded that the doctrine of the cases referred to in the previous section, allow- * 95 ing mandamus to the chief executive officer of a state as to the performance of purely ministerial duties, has much to commend it in the very strong reasoning adduced by the different courts in its favor, yet the weight of authority is clearly opposed to the doctrine. And the courts of Arkansas, Georgia, Illinois, Louisiana, Missouri, Michigan, Maine, Minnesota, New Jersey, Rhode Island, Florida and Tennessee have by a uniform current of authority established the doctrine that the chief executive of the state is, as to the performance of any and all official duties, entirely removed from the control of the courts, and that he is beyond the reach of mandamus, not only as to duties of a strictly executive or political nature, but even as to acts purely ministerial whose performance the legislature may have required at his hands.[1] In support of this doctrine, the courts adopting it have relied largely upon the three-fold division of the powers of government which prevails in this country, and upon the necessity of maintaining the perfect independence of the executive, legislative and judicial departments. And while, under the American system, it is intended that the functions of these co-ordinate departments shall be conjointly exercised, yet each is to be closely confined to its own particular sphere,

specific, private right depends, he may be made amenable to the compulsory process of the proper court by mandamus."

[1] Hawkins *v.* The Governor, 1 Ark. 571; State *v.* Towns, 8 Geo. 360; State *v.* Warmoth, 22 La. An. 1; State *v.* The Governor, 39 Mo. 388; People *v.* The Governor, 29 Mich. 320; *In re* Dennett, 32 Me. 508; State *v.* The Governor, 1 Dutch. 331; Chamberlain *v.* Sibley, 4 Minn. 309; Rice *v.* Austin, 19 Minn. 103; State *v.* Drew, 17 Fla. 67; Mauran *v.* Smith, 8 R. I. 192; People *v.* Bissell, 19 Ill. 229; People *v.* Cullom, 100 Ill. 472; People *v.* Yates, 40 Ill. 126; Turnpike Co. *v.* Brown, 8 Baxter, 490. But in State *v.* Board of Inspectors, 6 Lea, 12, the governor having answered without objecting to the jurisdiction of the court, and averring his willingness to perform the duty in question, a mandamus was granted to compel him to canvass the votes at an election and to declare the result.

* 96 and any interference on the part of the judiciary with the functions of the executive, either to command the execution of a duty enjoined upon him by law, or to regulate the manner of its performance, is an unwarrantable assumption of power upon the part of the judiciary, alike subversive of the political balance between the three great departments and destructive of the independence of the executive.[1] The

[1] State *v.* The Governor, 1 Dutch. 331; Hawkins *v.* The Governor, 1 Ark. 570; *In re* Dennett, 32 Me. 508; People *v.* Bissell, 19 Ill. 229; State *v.* Warmoth, 22 La. An. 1; State *v.* Drew, 17 Fla. 67; Mauran *v.* Smith, 8 R. I. 192. State *v.* The Governor, 1 Dutch. 331, was an application for a mandamus directing the governor to sign and issue to the relator a commission to an office to which he claimed to be duly elected. The court say: "In the third place, we are of opinion that the mandamus must be denied, upon the broad ground that this court has no power to award a mandamus, either to compel the execution of any duty enjoined on the executive by the constitution, or to direct the manner of its performance. The exercise of such power would be an unwarrantable interference with the action of the executive within his appropriate sphere of duty. The constitution has divided the powers of government into distinct departments, and cautiously provided for their independent exercise. It has expressly forbidden any person belonging to or constituting one of these departments, from exercising any of the powers properly belonging to either of the others, except as expressly provided in the constitution itself. It has vested in the governor all the executive powers of the government. Among the powers specifically enumerated, is that of issuing commissions under the great seal of the state to all such officers as shall require to be commissioned. The issuing of the commission under the constitution of this state is clearly an exercise of political power. In regard to any other executive duty prescribed by the constitution, it has never been pretended that the judiciary has the power to enforce its execution, or to direct the manner of its performance. The constitution requires that the governor is to take care that the laws be faithfully executed; can the judiciary compel the performance of this duty? He is required to sit as a member of the court of pardons; can the judiciary interfere if the duty is neglected? Why is it that in this particular branch of executive duty, (the issuing of commissions,) and in no other, the court may interfere? It is said that the granting of a commission is a mere ministerial act; but is it, therefore, less an executive act? As contradistinguished from judicial duties, all executive duties are ministerial. The idea seems to be entertained that the duty of the executive becomes ministerial, when no dis-

executive department, as to the discharge of its official functions, is responsible not to the judiciary, but to the * 97 people, and the courts can no more interfere with executive discretion, than can the legislature or executive with judicial discretion. And the constitutions of the various states having clearly fixed the boundaries between the powers of the three departments, the courts are powerless to obliterate the limits thus established.[1]

cretion is left as to the manner of its performance, and that in such case the court may interfere to compel its performance. If this be the test, it follows that wherever the executive duty is clear the judiciary is authorized to interfere; but in all cases of doubt or difficulty, or uncertainty, the responsibility of acting rests upon the executive alone. In many cases the law allows the executive no discretion. The duty must be performed in strict accordance with the law, but this court has not, therefore, power to order the duty to be performed. All executive duty is required to be executed by a higher authority than the order of this court, *viz.*, by the mandate of the constitution. The absence of discretionary power can not change the character of the act, or warrant the interposition of the judiciary. If by ministerial duties, are meant duties performed by one acting under superior authority, or not with unlimited control, none of the duties of the executive are ministerial. All the powers conferred by the constitution upon the governor are political powers, all the duties enjoined are political duties. Touching all the powers conferred on the executive by the constitution, he is entirely independent of the control of the judiciary, being responsible to the people alone, and liable to impeachment for misdemeanor in office."

[1] Hawkins v. The Governor, 1 Ark. 570. This was an application for a rule upon the governor of the state to show cause why a peremptory mandamus should not be awarded against him, commanding him to issue a commission to the petitioner for a public office which he claimed. The jurisdiction was denied by the court in an exhaustive opinion, LACY, J., concluding as follows: "The analysis of his duties, then, clearly proves that he is in no way amenable to the judiciary for the manner in which he shall exercise or discharge these duties. His responsibility rests with the people, and with the legislature. If he does an unconstitutional act, the judiciary can annul it, and thereby assert and maintain the vested rights of the citizen. The writ asked for, however, does not proceed upon the ground that the governor has done any illegal or unconstitutional act, but that he has refused to perform a legal or constitutional duty. In the first case, the court certainly has jurisdiction; and in the last, they unquestionably have not. The court can no more inter-

§ 121. The doctrine as thus stated has been most
* 98 frequently applied in cases where it has been sought by mandamus to compel the governor of a state to issue commissions or certificates of election to persons claiming to be rightly elected to public offices. And the courts have held the duty of issuing such commissions or certificates of election to be of a political nature, requiring the exercise of the political powers of the governor, and none the less an executive act because it is positively required of the governor by law. The mere fact that no discretion is left with the executive as to the manner of its performance, does not render it a ministerial duty in the sense that mandamus will lie to compel its performance, and whatever constitutional powers are conferred upon the executive are regarded as political powers, and all duties enjoined upon him as political duties. The mere absence, therefore, of any element of discretion as to the performance of the act, can not change its character or warrant the interposition of the extraordinary powers of the judiciary. And the issuing of a commission being thus treated as an executive or political, rather than a mere ministerial duty, the courts have refused to encroach upon the functions of the chief executive officer of the state by commanding him to perform this duty.[1] So the writ has been

fere with executive discretion, than the legislature or executive can with judicial discretion. The constitution marks the boundaries between the respective powers of the several departments, and to obliterate its limits would produce such a conflict of jurisdiction as would inevitably destroy our whole political fabric, and with it the principles of civil liberty itself. It would be an express violation of the constitution, which declares upon its face, 'that there shall be three separate and independent departments of government, and that no person or persons, being of one of these departments, shall exercise any power belonging to either of the others.' See Constitution, Article II, Section 2. This being the case, it is clearly demonstrable that the court has no jurisdiction of the cause now under consideration, and they have no power to award a mandamus to the governor to compel him to grant the commission. The motion must, therefore, be dismissed for want of jurisdiction."

[1] State *v.* The Governor, 39 Mo. 388; State *v.* The Governor, 1 Dutch. 331; Hawkins *v.* The Governor, 1

denied where it was sought to compel the governor, with other state officers, to declare the relator elected to an * 99 office, under a statute requiring such officers to open and compare the votes returned upon the election. In such case, it is held that the court can not entertain the inquiry

Ark. 570; State v. Drew, 17 Fla. 96. State v. The Governor, 39 Mo. 388, was an application to the supreme court of the state, to compel the governor to issue a commission to the relator as one of the justices of a county court. The jurisdiction of the court to interfere with the executive by mandamus, was questioned by demurrer to the petition. After a full review of the authorities, the demurrer was sustained and the mandamus refused. The reasons for refusing to interfere with the acts of the executive are very clearly stated by Mr. Justice WAGNER, as follows: "By Article 5, Section 25, of the constitution of this state, it is made the duty of the governor to commission all officers not otherwise provided for by law. There is no statutory enactment affecting this constitutional provision; the issuing of a commission is clearly an exercise of political power. But it is insisted that the granting of a commission is a mere ministerial act; but does it follow that it is therefore less an executive act? In one sense of the term, as contradistinguished from judicial duties, all executive duties may be said to be ministerial. We do not consider that the duty of the executive becomes ministerial because no discretion is left as to the manner of its performance, and that in such case the court may interfere to enforce performance. From such a doctrine it would follow that where the executive duty was clear, the court would be authorized to interfere; but in cases of doubt or difficulty, or uncertainty, the judiciary could afford no remedy, but the responsibility would rest alone on the discretion of the executive. In many cases no discretion is vested with the governor; his acts and functions must be performed in strict accordance with specific law, but this court is not on that account invested with power to compel the acts, duties and functions to be performed. The chief magistrate of the state is required to execute the duties devolving on him by law, by a higher authority than the orders of this court—by the mandate of the constitution. Whatever powers are conferred by the constitution on the executive are political powers—whatever duties are enjoined upon him are political duties. As to all powers conferred, or duties enjoined by the constitution on the governor, he is entirely independent of the judiciary, and responsible to the people alone at the polls, and liable to impeachment for misdemeanor in office. If the court can issue a writ of mandamus to compel the executive to grant a commission which he improperly, or from a mistaken view of the law withholds, why may they not award process to compel him to issue writs of election, and to see that the laws are

whether the duty required of the executive department has been correctly or incorrectly performed, since that department is beyond control by the judiciary, and is responsible for the correct performance of its duties only in the * 100 manner prescribed by the constitution. And the mere fact that such duty might have been imposed upon any other officer than the chief executive of the state, does not change its character or vary the rule, since the act must still be performed by the executive in his official capacity, for it is only in that capacity that the power is conferred upon him, and being entrusted to the executive department *eo nomine*, it is necessarily an official act.[1]

enforced and obeyed? If the power exists, and the jurisdiction is assumed, where is the limit to be placed? If he is clothed with a political discretion as regards the execution and enforcement of the laws, and many other duties which are enjoined on him, so he is concerning the issuing of commissions. If the court have power to prescribe the rule of his conduct in one case, they have in the other. This would make the judges the interpreters of the will of the executive, and the independence of the executive department as a co-ordinate branch of the government would be virtually destroyed." In an earlier case in Missouri, the doctrine was maintained that the general jurisdiction conferred upon the supreme court of the state by the constitution, giving it power to issue writs of mandamus, and to hear and determine the same, was sufficient to warrant the issuing of an alternative writ of mandamus to all persons, including the governor of the state, and that the proper course was to determine the question of jurisdiction over the person after return to the alternative writ. Pacific Railroad *v.* The Governor, 23 Mo. 353. In this case, however, the governor expressed his willingness to perform the duties required, provided the law requiring them should be held constitutional, so that it did not become necessary to pass upon the question of the ultimate right of the court to compel the performance of the duties by mandamus. In Georgia it has been held that the issuing of a commission by the governor of the state to officers duly appointed, is merely a ministerial duty, and that no satisfactory legal reasons exist why the jurisdiction by mandamus should not be extended to cover such duty. And the refusal to interfere by mandamus in such cases is based wholly upon political grounds, the court holding that the ultimate effect of granting the writ in the event of a refusal upon the part of the governor to obey it, would be to deprive the state of the head of one department of the government. State *v.* Towns, 8 Geo. 360.

[1] *In re* Dennett, 32 Maine, 508. The court, SHEPLEY, C. J., say:

§ 122. Upon somewhat similar principles, relief by mandamus has been denied where it was sought to * 101 compel the performance by the governor of a state of certain military duties incumbent upon him by law in his capacity as commander-in-chief of the military forces of the state. Thus, where it was made by law the duty of the

"This is a petition to the court, that a rule may issue that the governor and council and secretary of the state may show cause why a writ of mandamus should not issue, commanding the governor and council to declare the petitioner elected to the office of county commissioner for the county of Lincoln. If such a writ can not be legally issued by the court, the rule to show cause should not be made. By the constitution the powers of the government are divided into three distinct departments, and no person belonging to one of these, can exercise any of the powers properly belonging to either of the others, except in cases expressly directed or permitted. The authority conferred upon this court to issue writs of mandamus is limited to the issue of such writs to courts of inferior jurisdiction, to corporations, and to individuals. The act approved on February 22, 1842, c. 3, § 2, provides, that 'the governor and council shall open and compare the votes returned as specified in the first section of this act.' It is by such comparison of the votes returned for each candidate, that the fact is ascertained, that some person has or has not been elected to the office of county commissioner. If the act of opening and comparing the votes returned be an official duty to be performed by the executive department, this court can not entertain the inquiry whether it has been correctly or incorrectly performed. That department is responsible for the correct performance of its duties in the manner prescribed by the constitution, but it is not responsible to the judicial department. The argument that it can not properly be regarded as an official duty of the executive department, because its performance might by law have been entrusted to other persons, is not regarded as sound. The performance of the duty might have been entrusted to others, and it might have been entrusted to the judicial department. It does not follow that an act can not be the official act of a department of the government because other persons might lawfully have performed the same acts, if performance had been by law entrusted to them. This court has been authorized to lay out highways; and it could do so only as a court and in the exercise of its official duties; and yet other persons might have been authorized to perform those duties. Money is granted and works are directed to be performed by law under the direction of the president of the United States or of a governor of a state. In such cases the law might have entrusted the supervision to other persons. This duty is not necessarily to be performed by an

governor, as commander-in-chief of the military of the state, to prefer charges against military officers for misconduct, and to convene a court martial for the trial of such charges, the court refused to interfere by mandamus to coerce the performance of this duty, upon the ground of the necessary independence of the three co-ordinate departments of the government, and the necessity of limiting each
* 102 department to its appropriate sphere of action. Nor in such case is the rule affected by the fact that the duty whose performance is sought is incumbent upon the executive, not in his civil capacity as governor, but in his military capacity as commander-in-chief, since the two functions are necessarily and inseparably united, and the governor is no more subject to the control of the courts in one capacity than in the other.[1]

§ 123. The issuing and delivering by the governor of a state of state bonds, claimed by relators in payment of certain public work performed by them under an act of legislature, is regarded as a duty falling within the principles above discussed, and hence beyond control by mandamus.[2] So the writ has been refused, where it was sought to compel the governor to issue to the relator new bonds of the state for arrears of interest due upon certain other state bonds, the issuing of the new bonds being required of the governor by an act of legislature.[3] So, too, mandamus has been denied against the governor of a state, where it was sought to compel him to comply with his official duty, by depositing in the office of the secretary of state a bill duly passed by both houses of the legislature.[4]

executive department of the government by any provision of the constitution. When the performance is by law entrusted to an executive department of a government *eo nomine*, the performance of the duty is an official act. The individual or persons composing the executive department can not perform the act without being clothed with the official authority."

[1] Mauran *v.* Smith, 8 R. I. 192.

[2] State *v.* Warmoth, 22 La. An. 1.

[3] People *v.* Bissell, 19 Ill. 229.

[4] People *v.* Yates, 40 Ill. 126. And see People *v.* Hatch, 33 Ill. 9.

§ 124. From the peculiar form and structure of our system of government, each state being sovereign and independent within itself, except in as far as its sovereignty may have been delegated to the general government, it follows that the chief executive officers of the different states are entirely independent of control by the federal judiciary in the performance of their official duties, and these duties can not be coerced by mandamus from the federal courts. And while it is the plain and imperative duty of the governor of any state, upon proper demand made by the governor of any other state, to deliver up fugitives from justice from such other state, this duty being imposed upon him by the constitution and laws of the United States, yet the federal courts are powerless to compel the performance of this duty, and can not * 103 grant the writ of mandamus in such a case, even though the act to be performed is purely ministerial. The performance of such duties is to be left to the fidelity of the executive of each state to the compact entered into with the other states when it became a member of the union, and if he refuses to perform so plain a duty, there is no power in the federal government to coerce its performance.[1]

§ 124 *a*. Some conflict of authority exists as to the jurisdiction of the courts by mandamus over such state officers as a secretary of state, a state treasurer, a state auditor and other like officers. In Wisconsin it is held that the courts may entertain such jurisdiction in cases of purely ministerial acts or duties, whose performance has been allotted by law to the officer in question. Thus, the relief has been granted to compel a secretary of state to revoke a license authorizing a foreign insurance company to do business in the state, when the company has removed an action against it to the federal court, in violation of the conditions imposed upon it by the state not to remove such actions. In such case, although the secretary is required to ascertain the exist-

[1] Commonwealth *v.* Dennison, 24 How. 66.

ence of the facts upon which his authority to revoke the license rests, his action is not regarded as judicial, but simply ministerial, and therefore subject to judicial control.[1] And the license having been revoked, the writ will not go to compel the secretary to grant a new license.[2] So the writ has been granted to require the secretary of state to audit and allow a claim against the state, when such duty was imposed upon him by law.[3]

§ 124 *b*. In Minnesota the courts have denied relief by mandamus against the class of officers under consideration, including the secretary of state, the state treasurer and the state auditor, upon the ground that these offices are branches of the executive department of the government, and as such exempt from judicial interference or control.[4] And it is held that the fact that the duty whose performance is sought is a purely ministerial duty, which might have been imposed upon any other officer, does not affect the application of the rule.[5] It is also held that the exemption of such officers from coercion by the courts is not a mere personal privilege which the incumbent of the office may waive at his pleasure, but is a restriction imposed for the public good. And although the officer may waive the objection and submit himself to the jurisdiction of the court, it will still refuse to coerce the performance of his duty.[6] So in Louisiana the writ has been denied when it was sought to compel the secretary of state to promulgate as a law an act of the legislature by publishing it in the official journal of the state, upon the

[1] State *v.* Doyle, 40 Wis. 175.

[2] State *v.* Doyle, 40 Wis. 220. In State *v.* Hayne, 8 Rich. N. S. 367, it was held that mandamus would lie to compel the secretary of state to deliver the returns of an election for governor and lieutenant-governor to the speaker of the House of Representatives. But it appearing that the secretary had already delivered the returns to a person not entitled thereto, the question whether the writ should then issue was reserved for further argument.

[3] State *v.* Warner, 55 Wis. 271.

[4] State *v.* Dike, 20 Minn. 363; State *v.* Whitcomb, 28 Minn. 50.

[5] State *v.* Whitcomb, 28 Minn. 50.

[6] State *v.* Dike, 20 Minn. 363.

ground that the correction of such abuses should be sought at the hands of the legislative and executive departments, and not of the judicial.[1]

§ 125. Mandamus will not lie to a secretary of state, to require him to certify an enrolled act of the legislature to be a law, which has not come into his possession under and by virtue of the law defining his duties, even though it be his duty to make certified copies of all laws, acts, resolutions, or other records pertaining to his office. Thus, where a bill has been placed in the hands of the secretary of state by the lieutenant-governor, with the written objections of the governor thereto, with instructions to keep and return the bill on the opening of the next session of the legislature to the house in which it originated, the secretary will not be required by mandamus to certify that the bill was a law, and had become so by the failure of the governor to return the same with his objections within the time fixed by law.[2]

§ 126. In Texas the general doctrine exempting the chief executive officer of the state from control by mandamus is extended to other state officers whose functions partake in some degree of an executive nature, such as the commissioner of the general land office of the state. Such an officer being regarded as forming a part of the executive department of the state government, the courts will not interfere with or control the performance of his duties by mandamus.[3] Thus, the writ will not go to the commissioner of the land office to compel the delivery to a railway company of certificates for land

[1] State *v.* Deslonde, 27 La. An. 71. In England mandamus will not lie against the servants of the crown, such as the lords of the treasury, to compel the performance of a duty incumbent upon the crown, such officers being regarded as amenable to the crown whose servants they are, and not to the court. Queen *v.* Lords Commissioners, L. R. 7 Q. B. 387, disaffirming King *v.* Lords Commissioners, 4 Ad. & E. 286. And see King *v.* Lords Commissioners, 4 Ad. & E. 984.

[2] People *v.* Hatch, 33 Ill. 9.

[3] Bledsoe *v.* International R. Co. 40 Tex. 537; Chalk *v.* Darden, 47 Tex. 438; Galveston B. &. C. R. Co. *v.* Gross, 47 Tex. 428.

donated by the state in aid of the company, since as to such duties the commissioner is regarded as being as much beyond judicial control as is the governor of the state.[1] So mandamus will not lie to the comptroller of the state for the delivery of state bonds voted by the legislature in aid of a railway company, especially when the discharge of his duty by the comptroller involves the exercise of official judgment and discretion.[2]

§ 127. Questions of much nicety have arisen in * 104 determining the extent to which the courts may interfere by mandamus with the heads of executive departments of the government of the United States, cabinet officers and others of a like nature, whose general functions are of an executive or political character. The true test to be applied in cases of this nature, is whether the duty is of an executive or political character, requiring the exercise of official judgment, or whether it is ministerial in its nature, involving the exercise of no official discretion, being specifically and peremptorily required of the officer. If of the latter class, the courts, without attempting to interfere with the general executive or political functions of the officer, may properly require at his hands the performance of a duty plainly incumbent upon him by law, and as to which he is vested with no discretionary powers. Thus, where by the provisions of an act of congress, the solicitor of the treasury department was directed to audit and adjust certain claims against the postal department of the government, and to allow the claimants such an amount as he should deem just, and it was made the duty of the postmaster-general to credit the claimants with whatever sum the solicitor should award, upon refusal of the postmaster-general to perform this duty mandamus was granted, the act required being regarded as a precise, definite act, ministerial

[1] Galveston B. & C. R. Co. v. Gross, 47 Tex. 428, overruling Houston & Great Northern R. Co. v. Kuechler, 36 Tex. 382.

[2] Bledsoe v. International R. Co. 40 Tex. 537.

in its nature, and concerning which the postmaster-general was vested with no discretion.[1]

§ 128. The rule as laid down in the preceding section would seem to be limited to such acts or * 107 proceedings on the part of the officer as are not implied in the inherent functions of his office, being rather of an extraneous character, ministerial in their nature, and required of the individual rather than of the functionary.[2]

[1] Kendall *v.* The United States, 12 Pet. 524. The case of Marbury *v.* Madison, 1 Cranch, 49, has been repeatedly cited in support of the same doctrine, and has been regarded by the courts, almost without exception, as the leading American case in support of the jurisdiction by mandamus over the acts of ministerial officers. In truth, no adjudication of the courts has ever been more thoroughly misunderstood, or more persistently misapplied. Marbury *v.* Madison, decided in 1803, was an application to the Supreme Court of the United States, invoking the aid of its original jurisdiction, for a rule upon Mr. Madison, the then secretary of state, to show cause why he should not deliver to the relators their commissions as justices of the peace for the District of Columbia, to which offices they had been duly nominated by the president and confirmed by the senate. The court refused to interfere, upon the ground that its original jurisdiction, being limited by the constitution to cases "affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party," did not extend to the case of public officers, and that that clause of the judiciary act authorizing the supreme court to issue writs of mandamus to such officers, was therefore unconstitutional and void. It will thus be seen that the question of jurisdiction was the sole question upon which the court were called upon to decide, and beyond this question the case can not be regarded as authority. Notwithstanding this fact, the case has been constantly cited from that day to this, as the leading authority in support of the jurisdiction by mandamus over ministerial officers, and hardly a case has occurred in which the relief has been granted to compel the performance of ministerial duties, where the court has not relied upon Marbury *v.* Madison as conclusive authority in support of the jurisdiction. The views of the court as presented by Chief Justice MARSHALL, upon the question of mandamus to ministerial officers, are, of course, entitled to the respect which is due to all the legal opinions of the first of American jurists. But as judicial authority in the class of cases under consideration, they are mere *obiter dicta.*

[2] See United States *v.* Guthrie, 17 How. 284; Brashear *v.* Mason, 6 How. 92.

Where, therefore, the particular duty in question is one which is required of a cabinet officer or head of a department, in the ordinary and usual course of his official duties, necessarily calling for the exercise of some degree of official judgment and discretion, and he has acted upon or decided the case presented, the courts have uniformly refused to interfere by mandamus to revise such action or to control his decision.[1]

§ 129. This principle has been repeatedly applied to cases where the secretary of the treasury, in the ordinary discharge of his duties, has passed upon and refused to allow a claim upon the treasury of the United States. In such cases, his action being within the limits of his offi-
* 108 cial duties, and the power and duty of determining the justice and legality of the claim being incumbent upon him by law, the courts will not entertain an application for a mandamus to compel the secretary to pay such rejected claim.[2] Indeed, it is a sufficient objection to interference by mandamus in such cases, that the secretary of the
* 109 treasury is prohibited by law from directing the payment of any money out of the treasury not specifically appropriated by law.[3] Nor will the courts in any case compel by mandamus the payment of money out of the United States treasury, in satisfaction of disputed or controverted claims against the government.[4] And in
* 110 accordance with the well-settled principle that no action for a debt can be maintained against the government, except by its own consent, mandamus will not lie to enforce a claim circuitously against the secretary of the treasury, where it can not be enforced against the govern-

[1] Decatur v. Paulding, 14 Pet. 497; United States v. Guthrie, 17 How. 284; Commissioner of Patents v. Whiteley, 4 Wal. 522; Secretary v. McGarrahan, 9 Wal. 298; United States v. Boutwell, 3 McArthur, 172; United States v. Key, 3 McArthur, 337.

[2] United States v. Guthrie, 17 How. 284; Brashear v. Mason, 6 How. 92; United States v. Boutwell, 3 McArthur, 172.

[3] United States v. Guthrie, 17 How. 284.

[4] United States v. Guthrie, 17 How. 284.

ment. So the writ will be refused where it is sought to compel the secretary of the treasury to enter a verdict against the United States upon the books of the treasury department, and to pay the amount of such verdict, it being a sufficient objection that there has been no appropriation by congress to pay the claim, since without such appropriation the secretary of the treasury is powerless to act in the premises. And, generally, it may be said that mandamus will not lie to the secretary of the treasury to perform any act whose performance is not expressly required by law.[1]

§ 130. The rule denying the aid of mandamus to control the action of cabinet officers and others whose functions are of a like character, in cases where they have passed upon matters properly resting within their official discretion, has been applied to the duty of the secretary of the navy in expounding the naval pension laws. And where it is made the duty of that officer to pay pensions from the navy pension fund, according to the terms of the acts of congress regulating the subject, of which fund he is constituted the trustee, when the secretary has exercised his judgment in construing the law under which he acts, in a case properly falling within his jurisdiction, his decision is final and will not be controlled by mandamus. Thus, where an applicant claims a pension under an act of congress and another under a resolution of congress, and the secretary has decided that the claim can only be sustained as to one, leaving the applicant to select under which to proceed, the decision will not be revised by mandamus.[2]

§ 131. Upon similar principles the writ has been refused where sought to correct the action of the com- * 111 missioner of patents upon matters properly falling within the scope of his official action. And where the commissioner is required by law to grant reissues of patents to assignees, it is his first duty to decide whether the applicant

[1] Reeside v. Walker, 11 How. 272.

[2] Decatur v. Paulding, 14 Pet. 497.

for the reissue is an assignee, and having examined
* 112 this question and decided adversely to the applicant,
the writ will not go to compel him to make another examination, since it will not be allowed to subserve the purposes of a writ of error.[1]

§ 132. The duty of executive officers of the general government in passing upon claims for the issuing of patents for public lands, necessarily involving the hearing of proofs and the rendering of a decision thereon, is regarded as a duty involving the exercise of such a degree of judgment and discretion as to remove it from the control of the courts. Mandamus, therefore, will not lie to the secretary of the interior to compel the issuing of a patent to a claimant whose application has been refused.[2] Where, however, an application for a patent for public lands has been decided by the proper officers in favor of the applicant, and a patent for the lands has been duly made out and there remains only the ministerial duty of delivering it to the grantee, the secretary of the interior may be required by mandamus to make such delivery.[3]

§ 133. As regards duties imposed by law upon sheriffs, who are generally considered as executive officers, it is to be observed that mandamus will lie to such officers, commanding the performance of specific duties clearly enjoined upon them by virtue of their office, or by operation of law, and concerning which they are vested with no discretionary powers.[4] Thus, where the duty is imposed upon a sheriff of choosing appraisers to fix the value of property taken on execution,
which is claimed by the judgment debtor as exempt
* 113 from levy under the exemption laws of the state, the
duty of the sheriff being plain and imperative, it may be enforced by mandamus, there being no other adequate

[1] Commissioner of Patents v. Whiteley, 4 Wal. 522.

[2] Secretary v. McGarrahan, 9 Wal. 298.

[3] United States v. Schurz, 102 U. S. 378.

[4] People v. McClay, 2 Neb. 7: Fremont v. Crippen, 10 Cal. 211.

remedy to enforce its performance.[1] So the writ will go to command a sheriff to execute final process of restitution in an action of forcible detainer, his duty in the premises being plain and unequivocal. And in such case, the existence of a remedy by an action upon the sheriff's bond presents no bar to the jurisdiction by mandamus, since the possession of the property in controversy is the main thing sought, and this can only be had by enforcing the writ of restitution.[2] So a creditor holding a mortgage upon real estate as an entirety, and entitled to have it sold as such and not in parts, may have the aid of mandamus to require a sheriff to sell the premises as an entirety.[3]

§ 134. The writ has been granted to compel a sheriff to execute a conveyance of land sold on execution to one claiming to be entitled thereto as a purchasing creditor, even though the sheriff had issued a prior deed to another creditor claiming in the same capacity, and the land had thus passed into the hands of an innocent purchaser.[4] But the writ will not go to compel the issuing of a deed by a sheriff of lands sold at a judicial sale, to a purchaser who refuses payment of the purchase money on the ground that he is entitled to the land as being the oldest execution creditor, there being an unsettled contest as to the priority of lien.[5] So it will not lie to require a sheriff to execute a tax deed containing recitals directly contradicted by his own returns of the tax sale.[6] Nor will the writ be granted to compel the issuing of a sheriff's deed for land sold under execution, where the proceedings are so far voidable that the purchaser's right is by no means clear, as where the sheriff has sold several * 114 distinct and separate tracts in one lot and for one aggregate price, it being his duty to offer each tract for sale separately.[7] So it will not go to direct a sheriff to levy an

[1] People v. McClay, 2 Neb. 7; Pudney v. Burkhardt, 62 Ind. 179.

[2] Fremont v. Crippen, 10 Cal. 211.

[3] Morris v. Womble, 30 La. An. 1312.

[4] People v. Fleming, 4 Denio, 137.

[5] Williams v. Smith, 6 Cal. 91.

[6] Hewell v. Lane, 53 Cal. 218.

[7] Winters v. Heirs of Burford, 6 Co'd. 328.

execution upon property the title to which is in the wife of the judgment debtor, since the relator's right is not clear in such a case and because there is an adequate remedy against the sheriff if he improperly refuses to execute a writ.[1]

VIII. Legislative Officers.

§ 135. Mandamus not granted to legislative department as to legislative functions.
136. But may be granted as to ministerial duties.

§ 135. As regards the jurisdiction of the courts by mandamus over legislative officers, while but few cases have occurred where judicial aid has actually been invoked against the legislative department, the question would seem upon principle to present no difficulties, and to be readily solved by an application of the doctrines already established as applicable to cases where the extraordinary aid of the courts has been invoked against executive officers. And it may be asserted as a principle founded upon the clearest legal reasoning, that legislative officers, in as far as concerns their purely legislative functions, are beyond control of the courts by the writ of mandamus. The legislative department being a co-ordinate and independent branch of the government, its action within its own sphere can not be revised or controlled by mandamus from the judicial department, without a gross usurpation of power on the part of the latter. Mandamus, therefore, will not lie to compel the speaker of the house of representatives of a state legislature to transmit to the senate a bill which it is alleged has passed the house, but which the speaker has decided has not passed. The question being strictly within the legislative functions of the speaker, and the house having sustained his decision on appeal therefrom, the courts will refuse to interfere with such an exer-

[1] State v. Craft, 17 Fla. 722.

cise of official judgment and discretion in a matter * 115 properly within the jurisdiction of the legislative department.[1]

§ 136. Where, however, the duty required of the legislative officer is simply of a ministerial nature, not calling for the exercise of any especial legislative functions, nor involving any degree of official discretion, there would seem to be no impropriety in interfering by mandamus upon a failure to perform the duty. Thus, the writ has been granted, upon the application of a member of the house of representatives of a state, to compel the speaker of the house to certify to the comptroller of public accounts the amount to which the member was entitled as compensation for mileage. But even in such a case the jurisdiction is asserted with a considerable degree of caution.[2]

[1] *Ex parte* Echols, 39 Ala. 698. Say the court, BYRD, J.: * * "The speaker decided that the bill had not passed by a vote of two-thirds of that branch of the legislature; and an appeal was taken from that decision to the house, and the house sustained the decision of the speaker. This was a question certainly within the jurisdiction of the speaker and house to pass upon, and is not a mere ministerial duty, but one that pertains to their legislative functions, and is one over which the house has exclusive jurisdiction. No other department of the government can revise its action in this respect, without a usurpation of power. * * This court will not interfere with either of the other co-ordinate departments of the government in the legitimate exercise of their jurisdiction and powers, except to enforce mere ministerial acts, required by law to be performed by some officer thereof; and not then, if the law leaves it discretionary with the officer or department. * * It seems to be held by all the authorities, that the writ of mandamus can only issue to some officer required by law to perform some ministerial act, or to a judicial officer to require him to take action; but not in a matter requiring judgment or discretion, to direct or control him in the exercise of either. Among all the cases and text books on this subject, none go to the length of laying down the doctrine that the speaker of the house of representatives, or of a legislative body, in a matter arising in the regular course of legislation, upon which he is called to decide, can be controlled by this or any other tribunal, except by the one over which he presides; and that having sustained his opinion and action, this court can not review it."

[2] *Ex parte* Pickett, 24 Ala. 91.

IX. Taxing Officers.

§ 137. The jurisdiction outlined.
138. English precedents.
139. Writ granted to enforce ministerial duties of taxing officers.
139 *a*. The same.
140. When granted to compel equalization of assessments.
141. Not granted after officers have acted upon correction of assessments.
142. When granted in aid of collection of taxes against corporations.
143. Delinquent tax collectors.
144. Writ not granted before omission of duty; nor after time has elapsed; respondents must actually be in office.
145. Purchaser of tax-sale certificates entitled to mandamus.
146. Writ granted to correct illegal assessments upon United States bonds.
146 *a*. Issuing of tax deeds.

§ 137. The jurisdiction by mandamus over the
* 116 official acts of officers entrusted with the levying and collection of taxes forms a part of the general jurisdiction by this writ over the acts of public officers, and may be appropriately considered in this place. We have elsewhere considered the use of the writ as applied to cases of municipal taxation, and the enforcement of municipal-aid bonds,[1] and it is proposed to consider here the more general principles applicable to all officers entrusted by law with the duty of levying and collecting taxes.

§ 138. Perhaps the earliest reported case where the extraordinary aid of a mandamus was applied to the subject of taxation, was where the writ was allowed by the kings bench to compel local officers entrusted with the levying of a land tax to tax the land equally.[2] The propriety of the writ for this purpose was, however, afterward denied by the kings bench, and it was held that the appropriate remedy was by

[1] See Chapter V, Subdivision III.

[2] Queen *v.* Commissioners of Land Tax, 11 Mod. Rep. 206.

appeal from the action of the taxing officers.[1] And it was held, still later, that the writ should not go to require the making of an equal poor rate on the inhabitants * 117 of a parish, upon allegations that it was being made unequally, if the party dissatisfied had another remedy by appeal.[2]

§ 139. In this country the doctrine is well established, that in all cases where the duty of assessing or levying a tax is plainly required by law of particular officers, and no other remedy exists by which the duty may be enforced, mandamus will lie, the duty being treated as purely ministerial and unattended with any element of official discretion.[3] Thus, the duty of an assessor of taxes to assess lands liable thereto, is regarded merely as a ministerial act, and hence one which may be enforced by mandamus.[4] And where, by an act of legislature, commissioners are appointed to provide for the erection of county buildings, and the duty of levying a tax to defray their expenses is made incumbent upon an inferior court, the writ will go to compel the levying of a tax, it being a fixed, specific duty, and not resting in the discretion of the court.[5] So the extension of an assessment by a county clerk upon the tax books, being purely a ministerial act, may be enforced by mandamus.[6] So, too, a county auditor may be required to place certain assessments upon the tax warrant for collection,[7] or to enter upon the assessment book certain delinquent taxes, these duties being imposed upon him by law.[8]

[1] Butler *v.* Cobbett, 11 Mod. Rep. 254. But *semble*, that if the assessors should refuse to make any tax, mandamus would be the proper remedy to compel them to act. Id.

[2] King *v.* Churchwardens of Freshford, Andr. 24.

[3] People *v.* Shearer, 30 Cal. 645; Manor *v.* McCall, 5 Geo. 522. And see for an application of the same principle to municipal officers entrusted with the duty of levying municipal taxes, Chapter V, Subdivision III.

[4] People *v.* Shearer, 30 Cal. 645; Hyatt *v.* Allen, 54 Cal. 353.

[5] Manor *v.* McCall, 5 Geo. 522.

[6] State *v.* Byers, 67 Mo. 706.

[7] State *v.* Stout, 61 Ind. 143. Otherwise where the tax is unauthorized by law. State *v.* Humphreys, 25 Ohio St. 520.

[8] People *v.* Ashbury, 46 Cal. 523.

In like manner mandamus will lie to compel the proper officer of a state to levy a tax for the payment of interest upon bonded indebtedness of the state.[1]

§ 139 *a*. Upon similar principles, where certain lands are by law exempt from taxation, and it is made the duty of the auditor general of the state to reject the taxes upon such lands, the duty being plain and unmistakable, its enforcement may be had by mandamus.[2] And where the relator is entitled under a statute to be relieved from the payment of taxes upon property which he has conveyed to another, mandamus is the appropriate remedy to procure the transfer of the property upon the tax list to the name of the present owner.[3]

§ 140. As regards the duty of officers entrusted by law with the equalization of taxes and assessments, the courts may properly interfere by the writ to set such officers in motion, and to compel them to act upon an application properly presented by a tax-payer dissatisfied with the tax assessed against him.[4] And it has been held that the writ may be granted against assessors who have improperly assessed shares of bank stock owned by the relator, to require them to cancel or correct the assessment.[5] But mandamus will not go
* 118 to a board of supervisors requiring them to make corrections in the assessment of taxes in their county, after the assessments have been completed and warrants have been issued to the receiver of taxes and the matter has passed beyond the control of the supervisors, since the writ would be nugatory if issued, and the rule is well established that

[1] Morton *v.* Comptroller General, 4 Rich. N. S. 430. Otherwise, however, when the obligations whose payment is sought are void, having been issued under a statute which is held unconstitutional. State *v.* Comptroller General, 4 Rich. N. S. 185.

[2] People *v.* Auditor General, 9 Mich. 134.

[3] Cincinnati College *v.* Yeatman, 30 Ohio St. 276.

[4] Virginia & Truckee R. Co. *v.* County Commissioners, 5 Nev. 341.

[5] People *v.* Assessors of Barton, 44 Barb. 148; People *v.* Olmsted, 45 Barb. 644.

mandamus will never issue where it would be nugatory from want of power in the respondents to perform the act required.[1] Nor will the writ be allowed to require tax assessors to make an affidavit to their assessment roll in accordance with a statute, when it appears by their return that they can not truthfully make such return.[2]

§ 141. While, as shown in the preceding section, the writ may properly issue to set in motion officers entrusted with the correction of assessments, and to compel them to act upon an application properly presented, the courts will not interfere with or control the action of such officers when they have actually passed upon the application. The abatement or reduction of taxes improperly assessed is, in such cases, essentially a judicial rather than a ministerial act. Hence it follows that when the proper officers have passed upon an application for the reduction of taxes, and have decided it adversely to the party aggrieved, they can not be required by mandamus to alter their decision and to make an abatement in the tax.[3] So where school directors have assessed a school tax, the writ does not lie to compel them to discharge a tax-payer from payment of his portion of the tax, their power if any in this respect being discretionary.[4]

§ 142. The writ is sometimes invoked in aid of the collection of taxes assessed against corporate bodies, and it may be properly issued for this purpose, in the absence of any other adequate remedy to enforce the collection.[5] Thus, where it is made by law the duty of the president, or other proper officer of banking corporations, to set aside and withhold out of the dividends or profits of the bank the amount of

[1] Colonial Life Insurance Co. *v.* Supervisors of New York, 24 Barb. 166; People *v.* Supervisors of Westchester, 15 Barb. 607. And see People *v.* Supervisors of Greene, 12 Barb. 217.

[2] People *v.* Fowler, 55 N. Y. 252.

[3] Gibbs *v.* County Commissioners of Hampden, 19 Pick. 298.

[4] School Directors *v.* Anderson, 45 Pa. St. 388. See also *Ex parte* Lynch, 16 S. C. 32.

[5] State *v.* Mayhew, 2 Gill, 487; Person *v.* Warren R. Co. 3 Vroom, 441.

* 119 tax levied upon its stock, and to pay this amount into the treasury of the state, an appropriate case is presented for the aid of a mandamus upon a refusal to perform this duty, since the state has no other adequate remedy.[1] And where a railway company has made a lease of its road, the lessee stipulating to pay and discharge all taxes imposed on the property leased, the business being wholly conducted by the lessee and the lessor retaining no property of any material value, so that there is no other adequate remedy, mandamus will lie to compel payment of the tax.[2]

§ 143. Mandamus is the appropriate remedy to be employed against delinquent tax collectors to enforce the performance of their duties. And where the duty is clearly and unmistakably imposed upon public officers of issuing a warrant of distress against delinquent collectors, the issuing of such warrant may be enforced by mandamus if the collector neglects to collect and pay over the tax at the proper time.[3] Nor in such case can the respondent, as a ministerial officer, object that the act of the legislature authorizing the tax is unconstitutional, since it is not within the province of such officers to determine the constitutionality of laws, nor will the courts upon summary proceedings in mandamus determine as to the constitutionality of statutes affecting the rights of third persons.[4] And the writ has been granted to require a tax collector to pay into the county treasury taxes which he has collected, but failed to pay over.[5] So when it is the duty of a city council to direct the proper city officers to

[1] State *v.* Mayhew, 2 Gill, 487.

[2] Person *v.* Warren R. Co. 3 Vroom, 441.

[3] Smyth *v.* Titcomb, 31 Me. 272; Inhabitants of School District *v.* Clark, 33 Me. 482; Waldron *v.* Lee, 5 Pick. 323. But in the latter case, it is held that the court may look into the facts shown by the return to determine whether the tax was properly assessed.

[4] Smyth *v.* Titcomb, 31 Me. 272; Inhabitants of School District *v.* Clark, 33 Me. 482.

[5] People *v.* Austin, 46 Cal. 520. But see, *contra*, State *v.* Boullt, 26 La. An. 259.

proceed to sell lands which are delinquent in the payment of taxes, this duty may be enforced by mandamus.[1]

§ 144. In no event will the courts interfere by * 120 mandamus in anticipation of a supposed omission of duty, and the writ will not, therefore, go to compel taxing officers to assess a tax, the time for which has not yet arrived, merely upon the presumption that the officers will refuse to perform their duty at the proper time.[2] Nor will the writ be granted commanding a tax to be imposed for a special and particular purpose, after the time prescribed by the legislature for the levy has elapsed.[3] And where a tax collector, acting in good faith and in conformity with the order of a tribunal having jurisdiction of the matter, has remitted certain taxes, and his term of office has since expired by limitation, and he is therefore powerless to obey the mandate of the court, he will not be required by mandamus to proceed with the collection of the tax.[4] Nor will the writ issue to officers elect to levy a tax, who have failed to qualify and have never assumed to act in any manner whatever, since they can not even be treated as officers *de facto*.[5]

§ 145. The writ has been granted to compel a county treasurer to assign and transfer to the purchaser tax sale certificates for lands bid off by the county at tax sales, the purchaser having tendered the whole amount of taxes * 121 due, with the penalty, interest and costs, the law giving him a clear right to the assignment under such circumstances.[6] But if in such case, the purchaser has failed to bring himself within the provisions of the law governing the terms of his application to the treasurer for the

[1] State *v.* City Council of Camden, 39 N. J. L. 620.

[2] Commissioners of Public Schools *v.* County Commissioners, 20 Md. 449.

[3] Ellicott *v.* The Levy Court, 1 Har. & J. 360; Commissioners of Public Schools *v.* County Commissioners, 20 Md. 449.

[4] State *v.* Perrine, 5 Vroom, 254.

[5] State *v.* Supervisors of Beloit, 21 Wis. 280.

[6] State *v.* Magill, 4 Kan. 415.

assignment of the certificates, he will be refused the aid of a mandamus.[1]

§ 146. Where the boards of supervisors of certain counties are authorized and empowered, upon the application of any person aggrieved, to hear and determine claims for illegal assessments upon United States bonds and securities, which are exempt by law from taxation, and to repay the amount collected upon such illegal assessments, the duty imposed upon the supervisors is treated as a mandatory one, not resting in official discretion. The only questions for the supervisors to determine in such cases are questions of fact as to whether the illegal taxes have been paid and their amount, and the existence of the claims being undisputed, mandamus will go to require the supervisors to audit and allow the amounts thereof, and to cause the same to be levied and collected in the manner prescribed by law.[2]

§ 146 *a*. When an officer authorized by law to issue deeds upon the sale of lands for unpaid taxes is not empowered or required by law to insert in such deeds any recitals of the proceedings preliminary to the sale, he can not be required by mandamus to insert such recitals.[3] And it is a sufficient objection to the granting of a mandamus to compel the issuing of tax deeds that an action is pending in a court of competent jurisdiction, for the purpose of declaring void and setting aside the proceedings under which the tax sale was had.[4]

[1] State *v.* Bowker, 4 Kan. 114.

[2] People *v.* Supervisors of Otsego, 53 Barb. 564, 51 N. Y. 401.

[3] State *v.* Mantz, 62 Mo. 258.

[4] State *v.* Patterson. 11 Neb. 266.

CHAPTER III.

OF MANDAMUS TO INFERIOR COURTS.

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I. PRINCIPLES GOVERNING THE JURISDICTION.

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§ 147. The jurisdiction by the writ of mandamus
*123 over inferior judicial tribunals, although closely guarded and jealously exercised by the courts, is too well established to admit of controversy, and forms one of the most salutary features of the general jurisdiction of the courts by mandamus. It is most frequently invoked for the

purpose of setting inferior courts in motion, and to compel them to act where action has been either refused or delayed. The earlier remedy, adopted in England, for the refusal or neglect of justice on the part of the courts, was by * 124 the writ of *procedendo ad judicium*. This was an original writ, issuing out of chancery, to the judges of any subordinate court, commanding them in the king's name to proceed to judgment, but without specifying any particular judgment. If this writ was disobeyed, or if the judges to whom it was addressed still neglected or refused to act, they were liable to punishment for contempt, by an attachment returnable either in the kings bench or common pleas.[1]

§ 148. The use of the writ of *procedendo* for the purpose of quickening the action of inferior courts, and preventing a delay of justice, has in modern times been superseded by the writ of mandamus. And the latter is now regarded as the proper if not the only remedy, by which the sovereign power can compel the performance of official duty by inferior magistrates and officers of the law.[2] In England, it being the province of the court of kings bench to superintend all inferior tribunals, and to enforce the proper exercise of their powers, mandamus will lie from that court to the judges of any inferior court, commanding and requiring them to do justice according to the powers of their office, whenever they have delayed acting.[3] But it is to be borne in mind, with reference to the jurisdiction over the action of inferior courts, that it is exercised, not for the purpose of conferring power upon those courts, since this is beyond its scope and province, but only to compel the use of powers already existing. Hence the writ will never be awarded to compel a court to do that which, in the absence of such mandate, it would be powerless to do.[4]

§ 149. The province of the writ, in as far as it affects the

[1] 3 Bl. Com. 109.
[2] Waldron v. Lee, 5 Pick. 823.
[3] 3 Bl. Com. 111.
[4] State v. Judge of Orphan's Court, 15 Ala. 740.

action of inferior courts, is not to be extended for the purpose of compelling the rendition of a particular judgment, in accordance with the views of the higher court.[1] And while it is proper to compel the inferior tribunal to proceed
* 125 and render some judgment, in a case where it has refused or neglected to act, yet the writ will not prescribe the party for whom judgment shall be rendered, since this would be, in effect, to introduce the supervisory power of the appellate court into a cause yet depending in the inferior tribunal, and thus prematurely to decide the case, and to compel the inferior court to give judgment, not in accordance with its own views, but in conformity with the opinion of the higher tribunal. Such a procedure might justly be regarded as subversive of our whole system of jurisprudence.[2]

§ 150. While, as we shall hereafter see, the authorities hold, almost without exception, that in all matters resting within the jurisdiction of an inferior court, and upon which it has acted in a judicial capacity, mandamus will not lie to review its proceedings, or to revise its rulings, yet if the matters in question are clearly within the powers of the inferior court, but it refuses to exercise its jurisdiction, or to entertain the proceedings, the writ will lie to compel the court to act.[3] Thus, when it is made the duty of an inferior court to entertain and hear appeals from justices of the peace, mandamus will lie for a refusal to perform this duty.[4] So a court may be required to make an order to enable a person under indictment to take a deposition to which he is entitled under the laws of the state.[5] And the writ will go to direct a court to make final determination of a cause when it has declined to act,

[1] *Ex parte* Cage, 45 Cal. 248.

[2] Life & Fire Insurance Co. *v.* Adams, 9 Pet. 573.

[3] Beguhl *v.* Swan, 39 Cal. 411; State *v.* Laughlin, 75 Mo. 358; *Ex parte* Henderson, 6 Fla. 279; Cowan *v.* Doddridge, 22 Grat. 458; Cowan *v.* Fulton, 23 Grat. 579; Kent *v.* Dickinson, 25 Grat. 817; *Ex parte* Dickson, 64 Ala. 188; Floral Springs Water Company *v.* Rives, 14 Nev. 431.

[4] *Ex parte* Henderson, 6 Fla. 279; Floral Springs Water Company *v.* Rives, 14 Nev. 431.

[5] Giboney *v.* Rogers, 32 Ark. 462.

and has simply stricken the cause from the docket.[1] But it will not lie to compel a court to hear and determine a cause over which it has no jurisdiction.[2] And it has been refused when sought to command a court to grant a jury trial in a cause, the judge not having actually refused such trial, but having announced his intention to try the cause without a jury.[3] Nor will the writ be granted to compel the judge of an inferior court to re-investigate facts and circumstances of a case which he has previously fully examined and investigated, since he has the right to rely upon his previous decision, based upon a full investigation of the facts.[4]

§ 151. A distinction is recognized between cases where it is sought by mandamus to control the decision of an inferior court upon the merits of a cause, and cases where it has refused to go into the merits of the action, upon an erroneous construction of some question of law or of practice preliminary to the whole case. And while, as we shall see, the decision of such court upon the merits of the controversy will not be controlled by mandamus, yet if it has erroneously decided some question of law or of practice presented as a preliminary objection, and upon such erroneous * 126 construction has refused to go into the merits of the case, mandamus will lie to compel it to proceed.[5] For example, where, in a statutory proceeding instituted to test the election of an officer, the court below refuses to try the case upon its merits, and quashes the proceedings, upon the ground that the contestant has not given the notice required by statute, if such court has erred in its construction of the statute as to the notice required, the writ will be granted to compel it to reinstate the case and proceed to a hearing.[6] If, however, the point raised by the preliminary question be

[1] State v. Cape Girardeau Court of Common Pleas, 73 Mo. 560.

[2] State v. Rising, 10 Nev. 97.

[3] State v. Rising, 15 Nev. 164.

[4] *Ex parte* Campbell, 20 Ala. 89.

[5] Queen v. Justices of Kesteven, 8 Ad. & E. N. S. 810; Castello v. St. Louis Circuit Court, 28 Mo. 259; State v. Judge of Twenty-Sixth District Court, 34 La. An. 1177.

[6] Castello v. St. Louis Circuit Court, 28 Mo. 259.

§ 155. In conformity with the distinction under consideration, it has also been held that mandamus will not lie to compel the granting of a writ of *habeas corpus*, the power to hear and determine applications for this writ being purely a judicial power.[1] Nor will it be granted to require obedience to a writ of *habeas corpus* issued by a lower court.[2] Nor will it lie to compel an inferior court to punish a witness for contempt in non-attendance, since every court must itself be the sole judge of whether a contempt has been committed against its process.[3] So where an inferior court, of limited jurisdiction, is vested by law with the power of hearing and correcting errors in the assessment of taxes, its action will not be controlled by mandamus, since the hearing and determination of applications for the correction of assessments is a judicial and not a ministerial act.[4]

§ 156. The fundamental principle underlying the entire jurisdiction by mandamus over the action of inferior courts, is, that in all matters resting within the discretion of the inferior tribunal, mandamus will not lie to control or interfere with the exercise of such discretion. And while the jurisdiction of superior common-law courts over courts of inferior powers, by the writ of mandamus, is well established, it is exercised with the utmost caution, lest there should be any improper interference with the exercise of the judicial powers of the court below, and it will only be used in such manner as to leave the inferior tribunal untrammeled in the exercise of the discretionary or judicial powers with which it is properly vested by law. And the rule may be regarded as established by an overwhelming current of authority, both English and American, that mandamus will not lie to control the exercise of the discretion of inferior courts, and where such courts have acted judicially upon a matter properly presented to them, their decision can not be altered or

[1] People *v.* Russell, 46 Barb. 27.
[2] People *v.* Edwards, 66 Ill. 59.
[3] *Ex parte* Chamberlain, 4 Cow. 49.
[4] Miltenberger *v.* St. Louis Co. Court, 50 Mo. 172.

controlled by mandamus from a superior tribunal.[1] And it is important to observe that the rule applies * 129 with equal force, regardless of the propriety or impropriety of the action of the inferior court. It is sufficient that the discretion has been exercised, and whether rightly or wrongly exercised, it can not be questioned by mandamus.[2]

§ 157. Having, in the preceding section, considered the

[1] Judges of Oneida Common Pleas *v.* The People, 18 Wend. 79, overruling People *v.* Superior Court of N. Y. 5 Wend. 114; *Ex parte* Bacon and Lyon, 6 Cow. 392; *Ex parte* Benson, 7 Cow. 363; *Ex parte* Baily, 2 Cow. 479; *Ex parte* Nelson, 1 Cow. 417; People *v.* New York Common Pleas, 19 Wend. 113; People *v.* Judges of Oneida Common Pleas, 21 Wend. 20, overruling People *v.* Niagara Common Pleas, 12 Wend. 246; People *v.* Superior Court of New York, 19 Wend. 68; *Ex parte* Bassett, 2 Cow. 458; Gilbert *v.* Judges of Niagara Co. 3 Cow. 59; *Ex parte* Johnson, 3 Cow. 371; People *v.* Superior Court of New York, 19 Wend. 701; *Ex parte* Davenport, 6 Pet. 661; United States *v.* Lawrence, 3 Dall. 42; *Ex parte* Poultney, 12 Pet. 472; Postmaster General *v.* Trigg, 11 Pet. 173; *Ex parte* Roberts, 6 Pet. 216; *Ex parte* Taylor, 14 How. 3; *Ex parte* Many, 14 How. 24; *Ex parte* Burtis, 103 U. S. 238; *Ex parte* Railway Company, 101 U. S. 711; *Ex parte* City Council of Montgomery, 24 Ala. 98; *Ex parte* Opdyke, 62 Ala. 68; State *v.* Court of Common Pleas, 38 N. J. L. 182; State *v.* Norton, 20 Kan. 506; State *v.* Van Ness, 15 Fla. 317; Strahan *v.* County Court, 65 Mo. 644. *Ex parte* Henry, 24 Ala. 638; Gunn's Adm'r *v.* County of Pulaski, 3 Ark. 427; *Ex parte* Hays, 26 Ark. 510; McMillen *v.* Smith, Ib. 613; Goheen *v.* Myers, 18 B. Mon. 423; Louisiana *v.* Judge of Parish Court, 15 La. 521; State *v.* Judge of Superior District Court, 26 La. An. 116; People *v.* Sexton, 37 Cal. 532; Barksdale *v.* Cobb, 16 Geo. 13; *Ex parte* Banks, 28 Ala. 28; People *v.* Williams, 55 Ill. 178; People *v.* Judge of Probate, 16 Mich. 204; People *v.* Osceola Circuit Judge, 30 Mich. 99; People *v.* Marquette Circuit Judge, 38 Mich. 244; People *v.* St. Joseph Circuit Judge, 39 Mich. 21; People *v.* Judge of Superior Court, 40 Mich. 169; Chicago & Northwestern R. Co. *v.* Genesee Circuit Judge, 40 Mich. 168; People *v.* Judge of Superior Court, 41 Mich. 31; People *v.* Montcalm Circuit Judge, 41 Mich. 550; People *v.* Wayne Circuit Judge, 41 Mich. 551; People *v.* Judge of Superior Court, 41 Mich. 5; *Ex parte* Johnson, 25 Ark. 614; King *v.* Justices of Cambridgeshire, 1 Dow. & Ry. 325; Queen *v.* Harland, 8 Ad. & E. 826; Queen *v.* Old Hall, 10 Ad. & E. 248. But see, *contra*, People *v.* Columbia Common Pleas, 1 Wend. 297; Blunt *v.* Greenwood, 1 Cow. 15.

[2] Queen *v.* Harland, 8 Ad. & E. 826; State *v.* Watts, 8 La. 76.

general rule denying the writ in cases where it is invoked to control the judgment or discretion of an inferior court, it may not be inappropriate to consider some of the applications of the rule, as well as a few apparent exceptions which have been recognized. And it may be said, generally, that the discretion of inferior courts over questions of pleading arising in the course of their proceedings will not be controlled by mandamus.[1] Thus, where a court has set aside certain pleas offered in a suit pending therein, and has * 130 ordered them to be stricken out as a nullity, it will not be compelled to restore the pleas and to vacate its order.[2] So the discretion of courts of equity as to regulating the time and manner of appearing and answering in chancery causes, will not ordinarily be interfered with by mandamus, such courts being at liberty to enlarge and extend the time for appearance and answer, whenever the purposes of justice require this course.[3] And the order of a subordinate court granting a feigned issue, to test the validity of a judgment, is not subject to review on mandamus.[4]

§ 158. Mandamus will not lie to compel a court to vacate a rule setting aside an execution, such a case being regarded as inappropriate for the exercise of the jurisdiction.[5] Nor will a rule be granted requiring an inferior court to show cause why the writ should not be granted, to compel such court to issue an execution which it has refused, where the record discloses that the court refused the execution after "mature deliberation," and there is nothing in the record dis-

[1] *Ex parte* Davenport, 6 Pet. 661; *Ex parte* Poultney, 12 Pet. 472. But see, *contra*, People *v.* Superior Court of New York, 18 Wend. 675, where it is held that if the inferior court has plainly erred and exceeded its authority in allowing an amendment, which was not within its legal discretion, the writ will lie to compel such court to vacate the order. And see People *v.* New York Common Pleas, 18 Wend. 534; *Ex parte* Lawrence, 34 Ala. 446.

[2] *Ex parte* Davenport, 6 Pet. 661.

[3] *Ex parte* Poultney, 12 Pet. 472.

[4] People *v.* Ulster Common Pleas, 18 Wend. 628.

[5] Vandeveer *v.* Conover, 1 Har. (N. J.) 271.

closing a *prima facie* case of mistake, misconduct, or omission of duty on the part of the court.[1]

§ 159. The general subject of costs and questions connected with the taxation of costs, being largely matters of judicial discretion, the courts are not inclined to interfere with the exercise of this discretion in inferior tribunals, and mandamus will not lie to modify or control their rulings as to costs.[2] And the rule is not limited to courts proper, but is extended to subordinate tribunals of a *quasi* judicial nature as well. And where such a tribunal, upon a proper application, has refused costs in a matter pending before it, the writ will not lie to compel it to allow the costs.[3] So where the amount of costs was left blank in the record of a judgment, and upon the case being affirmed on * 131 error, and sent back to the court below, it refused a motion to amend the record by inserting the amount of taxed costs, it was held that mandamus would not lie after such refusal, to compel the allowance of the costs.[4]

§ 160. The control of courts of general common-law jurisdiction over the setting aside of defaults and the granting of new trials, will not be interfered with by mandamus.[5]

[1] Postmaster General *v.* Trigg, 11 Pet. 173.

[2] *Ex parte* Nelson, 1 Cow. 417; People *v.* New York Common Pleas, 19 Wend. 113; Jansen *v.* Davison, 2 Johns. Cas. 72; Peralta *v.* Adams, 2 Cal. 594; *Ex parte* Many, 14 How. 24; State *v.* Judge of Kenosha Circuit Court, 3 Wis. 809.

[3] Chase *v.* Blackstone Canal Co. 10 Pick. 244; Morse, Petitioner, 18 Pick. 443.

[4] *Ex parte* Many, 14 How. 24. But the writ will lie from an appellate to an inferior court, to compel it to make an order for costs in conformity with the decision of the appellate court previously rendered. Jared *v.* Hill, 1 Blackf. 155.

[5] *Ex parte* Roberts, 6 Pet. 216; *Ex parte* Bacon and Lyon, 6 Cow. 392; *Ex parte* Benson, 7 Cow. 363; *Ex parte* Baily, 2 Cow. 479; State *v.* Watts, 8 La. 76. But see People *v.* Columbia Common Pleas, 1 Wend. 297, where it is held that the admissibility of affidavits of jurors, upon a motion for a new trial, is not a question of judicial discretion, but purely one of law, which may be investigated by the superior court upon an application for a mandamus. The doctrine of this case, however, may be regarded as substantially overruled by the opinion of the court in Judges of Oneida Common Pleas *v.* The People, 18 Wend. 79.

And in this respect an application for the writ to compel the inferior court to set aside a default and inquest is not distinguishable, in principle, from applications for new trials, and these are always considered as resting in the sound discretion of the court to which they are addressed, and not subject to review by mandamus.[1] And the granting or refusing of a rule to set aside a default, not being governed by fixed and imperative rules, but being rather a matter of sound judicial discretion, will not be interfered with by mandamus.[2] Nor is the rule altered or varied by the fact that the court below may have decided erroneously in rejecting the application in the first instance. Thus, the writ has been refused, when it was sought to compel the granting of a new trial on the ground that the court had erred in its instructions to the jury, since such questions were properly within the discretion of the inferior court, and the remedy should be sought * 132 by appeal or writ of error. Any other rule must necessarily result in an endless conflict of opinion upon questions, which, from their very nature, should be finally adjudicated by the inferior court.[3]

§ 161. The rule as above stated, denying the writ where it is sought to compel the granting of a new trial, has not been established without some conflict of authority. And it was formerly held by the courts of New York, that if the inferior court, in passing upon the application for a new trial, should deny to a party the benefit of an established rule of practice, not dependent at all upon circumstances, the superior court might interfere. Thus, where a rule had been granted for a new trial, upon the ground of newly discovered evidence, and upon the application for a mandamus to vacate the rule, it appeared that the plaintiffs were guilty of gross negligence in not procuring the evidence upon the former trial, and that it was, at the most, merely cumulative evidence,

[1] *Ex parte* Roberts, 6 Pet. 216.

[2] *Ex parte* Bacon and Lyon, 6 Cow. 392; *Ex parte* Benson, 7 Cow. 363.

[3] *Ex parte* Baily, 2 Cow. 479; State *v.* Watts, 8 La. 76.

and that established rules of practice had thus been violated, it was held a proper case for mandamus.[1] This doctrine, however, is plainly inconsistent with the whole current of authority, and has been expressly overruled in New York.[2]

§ 162. Upon principles similar to those discussed in the preceding sections, the writ will be refused where * 133 it is sought for the purpose of regulating or interfering with the control of courts over their own referees, where the practice prevails of referring causes for hearing and investigation. And the writ will not lie to compel the court to vacate an order setting aside a report of referees, even though the court to which the application is made is satisfied that the inferior tribunal erred in setting aside the report.[3] Thus, where the court below had set aside the report on the ground that it was based upon the testimony of a witness who was not credible, mandamus to vacate the rule was refused, notwithstanding the inferior court had decided erroneously.[4] Nor will the writ be granted in the class of cases under consideration because the court below has mistaken the weight of evidence, since mandamus deals only with questions of law, and it is not its province to determine disputed questions of fact.[5]

§ 163. We have already seen that the discretion of inferior courts over questions of pleading arising * 134 therein is not subject to control by mandamus. The same rule applies as to mere questions of practice, and while it has been held that errors in points of practice may be corrected by mandamus,[6] yet the later and better considered

[1] People *v.* Superior Court of New York, 5 Wend. 114. And see Same *v.* Same, 10 Wend. 285.

[2] Judges of Oneida Common Pleas *v.* The People, 18 Wend. 79.

[3] People *v.* Judges of Oneida Common Pleas, 21 Wend. 20, overruling People *v.* Niagara Common Pleas, 12 Wend. 246; *Ex parte* Bassett, 2 Cow. 458.

[4] *Ex parte* Bassett, 2 Cow. 458.

[5] People *v.* Superior Court of N. Y. 19 Wend. 68.

[6] Blunt *v.* Greenwood, 1 Cow. 15, where the writ was granted to compel the court to vacate an order setting aside a *fi. fa.*

doctrine is, that the writ will not lie to interfere with the discretion of an inferior court upon mere points of practice.[1]

§ 164. In further illustration of the rule that mandamus will not lie to control the exercise of judicial discretion, the writ will be refused where it is sought to compel a court or judge to accept a particular bond which has been rejected for insufficiency. And where the court has passed upon and adjudicated the question of the sufficiency of the bond, in a judicial proceeding, mandamus will not lie.[2] So where the duty of judging of the sufficiency of sureties upon an official bond, is, by law, devolved upon an inferior court, and it has passed upon the question and decided that the sureties were insufficient, its decision is not subject to review by mandamus.[3]

§ 165. The writ will not lie to compel a court to
* 135 hear the application of an insolvent debtor for his discharge under the laws of the state, where the court, upon due application, has decided that he was not entitled to such hearing.[4] And upon similar principles the relief will be refused, where it is invoked to compel commissioners of bankruptcy under a state law, to give the bankrupt a certificate of conformity, when it is shown by the return of the commissioners, that they had reason to doubt that the disclosure made by the bankrupt was a true disclosure of all his estate and effects. And this is true, even though the court to which the application for the writ is addressed, should differ in opinion from the commissioners upon the question of the sufficiency of the bankrupt's disclosures.[5]

§ 166. The aid of mandamus has sometimes been invoked to control the action of inferior courts of chancery jurisdic-

[1] *Ex parte* Coster, 7 Cow. 523. See also People *v.* Judges of Chautauque Common Pleas, 1 Wend. 73.

[2] State *v.* Bowen, 6 Ala. 511.

[3] Thomason *v.* The Justices, 8 Humph. 233. For cases where mandamus will lie to direct a court to act upon a bond presented for its approval, see § 231 *post*.

[4] Thomas *v.* His Creditors, 1 Har. (N. J.) 272.

[5] Respublica *v.* Clarkson, 1 Yeates, (2nd edition,) 46.

tion over the subject of injunctions, and to compel them to grant or dissolve an injunction in accordance with the views of the superior tribunal as to its propriety or impropriety. While there are cases where the courts, adopting the theory that the granting or withholding of an injunction is the exercise of a mere ministerial discretion, have interfered by mandamus to compel the granting of a writ when it has been improperly refused,[1] yet these cases have been overruled by later and better considered decisions, and the contrary doctrine has been established. And the rule may now be regarded as clearly settled, both upon principle and authority, that the granting or dissolving of injunctions is a matter of purely judicial discretion, and when this discretion has once been exercised, and the inferior court has refused to grant an injunction, or, if already granted, has refused to dissolve it, mandamus will not lie to control such decision.[2] Thus, the writ will not be granted to compel the dissolution of an injunction by an inferior court, even * 136 though it is alleged that the defendant in the injunction suit has, by his answer, fully denied all the equities of the injunction bill, and that he is without the right of appeal from the decision of the court refusing the dissolution, since in all such cases the decision of the inferior court is final and conclusive.[3] But it has been held in California that mandamus will lie to compel a court to issue an attach-

[1] *Ex parte* Conway, 4 Ark. 302; *Ex parte* Pile, 9 Ark. 336. But, even in Arkansas, the mandamus was allowed only in cases where personal injury was likely to result without the relief, and where the relator showed no injury sustained by himself different from that common to the whole community, the writ was not granted. Jones *v.* City of Little Rock, 25 Ark. 301. But the doctrine of the earlier Arkansas cases has been entirely overruled. See note *infra*.

[2] *Ex parte* Hays, 26 Ark. 510; McMillen *v.* Smith, Ib. 613; *Ex parte* City Council of Montgomery, 24 Ala. 98; *Ex parte* Schwab, 98 U. S. 240; Beebe *v.* Judge of Sixth District Court, 28 La. An. 905. And see State *v.* Parish Judge of St. Bernard, 31 La. An. 794; State *v.* Judge of Sixth District Court, 32 La. An. 549.

[3] *Ex parte* City Council of Montgomery, 24 Ala. 98.

* 137 ment for violation of an injunction, the remedy by appeal being considered inadequate in such case.[1] This doctrine, however, is plainly inconsistent with the principles already discussed, and it is believed to prevail in no other state.

§ 167. The writ will not be granted to compel a court to enter judgment upon one of several verdicts found by a jury, when it has already passed upon the question, and, in the exercise of its discretion, has refused to enter judgment.[2] So it will be refused where the purpose of the application is to compel the court to enter judgment in a cause in which it has seen fit to grant a new trial, since the question of the propriety or impropriety of granting a new trial is a question which can not be entertained upon proceedings in mandamus.[3] Nor will the writ be allowed to compel an inferior court to receive certain evidence in a cause pending therein, the admissibility of the evidence being a question addressed wholly to the judgment of the court itself.[4]

§ 168. The discretion of inferior courts in such matters as the granting of continuances, or the stay of proceedings, will not be controlled by mandamus.[5] And where a court has ordered a stay of proceedings under a levy, until the determination of a suit in replevin concerning the same property upon which the execution has been levied, the order being one which the court was fully competent to make, it will not be compelled by mandamus to vacate such order.[6]

§ 169. As a further illustration of the rule that the writ is not granted to control or interfere with the discretion of

[1] Merced Mining Co. *v.* Fremont, 7 Cal. 131; Ortman *v.* Dixon, 9 Cal. 23. But see Fremont *v.* Merced Mining Co. 9 Cal. 18.

[2] *Ex parte* Henry, 24 Ala. 638. But in State *v.* Adams, 76 Mo. 605, mandamus was granted to compel a court to enter judgment upon a verdict.

[3] State *v.* Watts, 8 La. 76.

[4] King *v.* Justices of Cambridgeshire, 1 Dow. & Ry. 325.

[5] Louisiana *v.* Judge of Parish Court, 15 La. 521; People *v.* Superior Court of New York, 19 Wend. 701; Territory *v.* Ortiz, 1 New Mexico, 5.

[6] People *v.* Superior Court of New York, 19 Wend. 701.

inferior courts, it is held that where, on setting aside a writ of *ca. sa.*, the court has imposed a condition that defendant should stipulate not to bring an action of false imprisonment against the plaintiff, mandamus will not lie to compel the court to strike out this condition, it being purely a * 138 question addressed to the discretion of the court.[1] So, where it is provided by statute that the sufficiency of an affidavit to hold to bail, and the amount of bail to be given, are to be decided by the court, and the court has already passed upon the question and held the affidavit sufficient, the writ will not lie, since its effect in such case would be to control the judgment of an inferior court while acting within the scope of its authority.[2]

§ 170. Mandamus will not lie to compel the judges of an inferior court to proceed against justices of the peace for malfeasance in office, where, under the constitution and laws of the state, the judges are vested with discretionary powers as to instituting such proceedings, and, in the exercise of their discretion, have refused to proceed.[3] Nor will it lie to compel a court to discharge bail,[4] or to vacate an order suppressing a deposition.[5]

§ 171. The discretion of courts of probate powers, over matters properly pertaining to their peculiar jurisdiction, properly falls within the general rule under discussion, and will not ordinarily be controlled by the writ of mandamus.[6] Thus, the refusal to grant letters of administration, *pendente lite*, is regarded as a legitimate exercise of judicial discretion, and being a decision from which an appeal will lie, it constitutes no foundation for proceedings in mandamus.[7] And the writ will be refused where it is sought for the purpose of compelling a probate judge to extend the statutory period

[1] Gilbert *v.* Judges of Niagara Co. 3 Cow. 59.

[2] *Ex parte* Taylor, 14 How. 3.

[3] *Ex parte* Johnson, 3 Cow. 371.

[4] *Ex parte* Small, 25 Ala. 74.

[5] *Ex parte* Elston, 25 Ala. 72.

[6] People *v.* Judge of Probate, 16 Mich. 204; Barksdale *v.* Cobb, 16 Geo. 13; State *v.* Mitchell, 2 Brev. (2nd edition,) 571. But see King *v.* Bettesworth, 7 Mod. Rep. 219.

[7] Barksdale *v.* Cobb, 16 Geo. 13.

allowed creditors for proving their claims against the estates of decedents, it being regarded as a question properly resting in the discretion of the probate judge.[1] If, however, a probate court declines to act upon a matter upon the ground of a want of jurisdiction, it may be set in motion by mandamus, the court granting the writ being of opinion that the probate court has jurisdiction over the controversy.[2]

§ 172. The granting or refusing of applications for a change of venue may be appropriately referred to the
* 139 same general rule, and the discretion of the courts over applications of this nature is not subject to control by mandamus.[3] And where the legislature has passed a special act, directing a change of venue in a criminal case, which the court has refused to grant on the ground of the unconstitutionality of the act, mandamus will not lie to compel the change of venue.[4] So, too, with interlocutory orders allowing new parties to come into a cause pending; and an order made before judgment is finally announced in the case, allowing parties not originally appearing in the case to come in, is regarded as the decision of a judicial question, and the action of the court in granting such order is not subject to review by mandamus.[5] Upon similar principles the writ will be refused where the object of the application is to compel a court to refer a case to a particular master in chancery

[1] People *v.* Judge of Probate, 16 Mich. 204.

[2] *Ex parte* Dickson, 64 Ala. 188.

[3] State *v.* Washburn, 22 Wis. 99; *Ex parte* Banks, 28 Ala. 28; Flagley *v.* Hubbard, 22 Cal. 34; People *v.* Sexton, 24 Cal. 78; People *v.* McRoberts, 100 Ill. 458. See also Coit *v.* Elliott, 28 Ark. 294. But see, *contra*, State *v.* McArthur, 13 Wis. 407, where it was held, that the statute regulating changes of venue, gave a defendant an unqualified and absolute right to a trial in the county where he resided, and that no discretion was left to the court in granting the application for such change, and that mandamus would therefore lie to compel the court to make the order changing the place of trial to the county of defendant's residence. This doctrine, however, was overruled in State *v.* Washburn, 22 Wis. 99, the court holding that the proper remedy for the party aggrieved was by appeal.

[4] Smith *v.* Judge of Twelfth District, 17 Cal. 547.

[5] People *v.* Sexton, 37 Cal. 532.

to take proofs therein, the reference being purely a question of discretion with the court.[1]

§ 173. Questions connected with the dismissal of actions, or with the refusal to dismiss, either for want of jurisdiction, or for other causes, sometimes afford occasion for invoking the aid of the extraordinary powers of the superior courts. The tendency of the courts is to regard such questions as proper matters of judicial discretion, and to withhold relief by mandamus in conformity with the general rule under discussion.[2] Thus, the relief will not be allowed to require a court to restore to its docket a case which it has dismissed for want of prosecution, such dismissal being a matter within the discretion of the court.[3] And the writ will not lie to compel an inferior court to reverse its action in refusing to dismiss a bill of complaint, since, in passing upon such dismissal, the court must necessarily have exercised its judicial functions, thus placing the question at issue beyond the * 140 control of a mandamus.[4] And the dismissal by an inferior court of an appeal from a justice of the peace for want of jurisdiction, being a judicial determination of a question incident to the proceedings and properly raised therein, and the court, in passing upon the question, having acted in a judicial and not in a ministerial capacity, mandamus will not lie to compel the reinstating of the appeal.[5]

§ 174. It frequently happens that inferior courts of limited jurisdiction are vested by law with control over special subjects, such as the granting of licenses, or the opening of roads, which, though not strictly matters of judicial cognizance, yet call for the exercise of such a degree of judgment and discretion, as to bring them within the general principles

[1] People v. Williams, 55 Ill. 178.

[2] Goheen v. Myers, 18 B. Mon. 423; *Ex parte* Johnson, 25 Ark. 614; Davis v. County Commissioners, 63 Me. 396.

[3] Davis v. County Commissioners, 63 Me. 396.

[4] *Ex parte* Johnson, 25 Ark. 614.

[5] Goheen v. Myers, 18 B. Mon. 423; People v. Weston, 28 Cal. 639; People v. Judges of Dutchess Common Pleas, 20 Wend. 658; State v. Wright, 4 Nev. 119.

already discussed. Thus, where the county courts in the respective counties of a state are clothed with discretionary powers in the matter of granting licenses for keeping houses of entertainment, and in the exercise of their powers they have refused an application for a license, their decision will not be revised by mandamus.[1] So where an inferior court, acting within the scope of its authority, has refused an application for the opening of a highway, upon a full hearing of the case, its judgment is regarded as binding and conclusive upon the question, until reversed in some proper method. The writ will, therefore, be refused to compel the opening of the road in such a case, since its effect would be to compel the court to reverse its own decision, and to enter another judgment, contrary to its own views of the law and right of the case.[2] So where a county court is invested with discretionary powers in the granting or refusing of licenses for the sale of liquors, the exercise of such discretion will not be controlled by mandamus.[3]

§ 175. Somewhat analogous to the cases considered in the previous section, are those where inferior courts are invested with the power of making nominations to certain offices, or of administering oaths of office, and the superior courts * 141 are inclined to withhold their interference to correct the decisions of inferior tribunals upon such questions.[4] And where, by the laws of a state, the justices of a county court are entrusted with the power of nominating to the governor of the state certain persons, from whom the sheriff of the county is to be selected and appointed, the justices are not subject, in the exercise of their discretion, to be controlled by mandamus, and the writ will not issue to com-

[1] *Ex parte* Yeager, 11 Grat. 655. And see Sights *v.* Yarnalls, 12 Grat. 292.

[2] Jones *v.* Justices of Stafford, 1 Leigh, 584.

[3] *Ex parte* Whittington, 34 Ark. 394.

[4] See Frisbie *v.* Justices of Wythe Co. 2 Va. Cas. 92; Day *v.* Justices of Fleming Co. Court, 3 B. Mon. 198; Applegate *v.* Applegate, 4 Met. Ky. 236.

pel them to nominate a particular person.[1] So, where it was sought to compel such justices to administer the oath of office to an under-sheriff, it was held a sufficient objection to making the writ peremptory, that the person appointed was of bad moral character, the justices being vested with some degree of discretion in administering the oath, for the protection of the public.[2]

§ 176. We have thus considered, in detail, the general rule denying relief by mandamus in all cases where the purpose of the application is to control the judgment or interfere with the discretion of the court below. The controlling principle in refusing the interference in all such cases, seems to be to leave the inferior court untrammeled in the exercise of its own powers, and to refuse a species of relief which would, in effect, substitute the opinion of the superior for that of the inferior tribunal, and compel the latter to render judgment, not according to its own views of the law, but by substituting another judgment in lieu of its own, while the cause is yet pending before it. Such a procedure would be alike foreign to the nature and purpose of the remedy under consideration, and we may, therefore, conclude that the doctrine is too firmly established, both upon principle and authority, to admit of any doubt, that mandamus will not lie to control the judgment or discretion of an inferior court.

§ 177. Another rule underlying the entire jurisdiction by mandamus over inferior courts, and second only in importance to that just considered, is, that the exist- * 142 ence of another adequate legal remedy is always a bar to relief by mandamus to control the action of such courts. And in all cases where full and ample relief may be had, either by appeal, writ of error, or otherwise, from the judgment, decree, or order of the subordinate court, mandamus will not lie, since the courts will not permit the functions of

[1] Frisbie v. Justices of Wythe Co. 2 Va. Cas. 92.

[2] Day v. Justices of Fleming Co. Court, 8 B. Mon. 198. And see Applegate v. Applegate, 4 Met. Ky. 236.

an appeal, or writ of error, to be usurped by the writ of mandamus. Indeed, the interference in such cases would, if tolerated, speedily absorb the entire time of appellate tribunals in revising and superintending the proceedings of inferior courts, and the embarrassment and delay of litigation would soon become insupportable, were the jurisdiction by mandamus sustained in cases properly falling within the appellate powers of the higher courts. It may, therefore, be laid down as the universal rule, prevailing both in England and America, that the existence of another remedy adequate to correct the action of the inferior court, will prevent relief by mandamus.[1]

§ 178. The rule under consideration is of comparatively ancient origin, and in an early case in the kings bench a mandamus was refused when it was sought to compel an inferior court to execute a judgment, the ground relied upon by the court being that a sufficient remedy existed by the * 143 writ *de executione judicii*, issuing out of chancery.[2]

And the writ will not be granted to compel a court to render a particular judgment, where full and speedy relief

[1] Wilkins *v.* Mitchell, 3 Salk. 229; Succession of Macarty, 2 La. An. 979; State *v.* Judge of Fourth District Court, 8 La. An. 92; State *v.* Judge of Sixth District Court, 9 La. An. 250; Leland *v.* Rose, 10 La. An. 415; State *v.* Judge of Second District Court, Ib. 420; State *v.* Judge of Sixth District Court, 12 La. An. 342; Marshall *v.* The State, 1 Ind. 72; State *v.* Taylor, 19 Wis. 566; Early *v.* Mannix, 15 Cal. 149; *Ex parte* Jones, 1 Ala. 15; State *v.* Morgan, 12 La. 118; *Ex parte* Cheatham, 6 Ark. 437; *Ex parte* Williamson, 8 Ark. 424; *Ex parte* Hutt, 14 Ark. 368; Byrne *v.* Harbison, 1 Mo. 225 (2nd edition, 160); State *v.* McAuliffe, 48 Mo. 112; *Ex parte* Goolsby, 2 Grat. 575; State *v.* Mitchell, 2 Brev. (2nd edition,) 571; *Ex parte* Bostwick, 1 Cow. 143; Jansen *v.* Davison, 2 Johns. Cas. 72; Peralta *v.* Adams, 2 Cal. 594; Flagley *v.* Hubbard, 22 Cal. 34; People *v.* Sexton, 24 Cal. 78; State *v.* Engleman, 45 Mo. 27; *Ex parte* Elston, 25 Ala. 72; *Ex parte* Small, Ib. 74; *Ex parte* Rowland, 26 Ala. 133; *Ex parte* Garlington, Ib. 170; State *v.* Curler, 4 Nev. 445; Shelby *v.* Hoffman, 7 Ohio St. 450; Mayberry *v.* Bowker, 14 Nev. 336; Clark *v.* Minnis, 50 Cal. 508; *Ex parte* Grant, 53 Ala. 16; Davidson *v.* Washburn, 56 Ala. 596; People *v.* Judge of Superior Court, 32 Mich. 190; Olson *v.* Muskegon Circuit Judge, 49 Mich. 85.

[2] Wilkins *v.* Mitchell, 3 Salk. 229.

may be had by appeal in the ordinary manner.[1] So it has been held, where a jury has found for plaintiff, but the court has arrested judgment for an alleged insufficiency in plaintiff's declaration, that mandamus would not lie to require the court to give judgment for plaintiff, since a writ of error might be had, the proper course being for the party desiring to bring error to apply to the court for judgment against himself.[2] And if a writ of error brought to reverse a judgment is informal, the remedy should be sought by a motion to vacate the writ, and not by mandamus to enforce execution of the judgment.[3]

§ 179. The remedy urged in bar of the jurisdiction by mandamus may be a statutory remedy, and if it is specific in its nature, and adequate for the purposes of the relief sought, it is clearly within the rule. Thus, where a sufficient remedy is provided by statute for compelling justices of the peace to grant appeals, mandamus will not lie.[4] And where the refusal of the inferior court to allow an appeal is itself subject to correction by appeal or supersedeas, such refusal constitutes no ground for interference by the extraordinary aid of mandamus.[5]

§ 180. In the application of the rule, the sole test seems to be, whether the order of the subordinate court which it is sought to correct is of such a nature as to be the subject of an appeal, or other corrective remedy. And if this is so, the writ will not issue to compel the court to vacate the order.[6] So where an inferior court has set aside a judgment, and has allowed defendant to plead to the merits, it will not be compelled by mandamus to remove the cause from its docket, and to issue an execution upon the judgment, since full and ade-

[1] Early *v.* Mannix, 15 Cal. 145.

[2] *Ex parte* Bostwick, 1 Cow. 143. But see, *contra*, Horne *v.* Barney, 19 Johns. Rep. 247.

[3] *Ex parte* French, 100 U. S. 1.

[4] State *v.* McAuliffe, 48 Mo. 112; Chicago, R. I. & P. R. Co. *v.* Franks, 55 Mo. 325.

[5] Byrne *v.* Harbison, 1 Mo. 225 (2nd edition, 160).

[6] State *v.* Taylor, 19 Wis. 566.

quate relief may be afforded by an appeal in the ordinary course.[1]

§ 181. Where, on a plea to the jurisdiction of the subordinate court, the plea has been sustained and the cause
* 144 ordered to another court for trial, such judgment being appealable, mandamus will not lie to compel the court first having cognizance of the matter to take jurisdiction of and determine the cause.[2] Nor will it lie to compel the granting of letters of administration to particular persons, where the court has already heard the application and appointed other persons, adequate remedy by appeal being given to the party aggrieved.[3] And the refusal of the court below to allow the attorney in fact of the relator to represent him on the trial of a cause, will not warrant the use of this peculiar remedy, since such refusal may properly be presented for revision by a bill of exceptions.[4]

§ 182. We have already seen that the power of inferior courts over the taxation of costs, and questions incident thereto, is so largely a matter of judicial discretion that its improper exercise will not be corrected by mandamus.[5] This, however, does not constitute the sole ground on which the refusal to interfere with such questions may be based. And whenever a court has refused to give judgment for costs to the party deeming himself entitled thereto, and relief from the defective judgment may be had by resorting to an appeal or writ of error, or the party aggrieved may resort to his action for the costs, relief by mandamus will be refused.[6]

§ 183. The granting or refusing of a change of venue, being a matter of judicial discretion, is not, as we have already seen, subject to control by mandamus.[7] But the refusal of the courts to interfere in such cases may also be based upon the

[1] *Ex parte* Goolsby, 2 Grat. 575.

[2] State *v.* Morgan, 12 La. 118.

[3] State *v.* Mitchell, 2 Brev. 2nd edition, 571.

[4] State *v.* Judge of Sixth District Court, 12 La. An. 342.

[5] See § 159 *ante.*

[6] Jansen *v.* Davison, 2 Johns. Cas. 72; Peralta *v.* Adams, 2 Cal. 594.

[7] See § 172 *ante.*

existence of other relief, since the decision of an inferior court, refusing an application for a change of venue, is subject to review by appeal from the final judgment, and mandamus will not, therefore, lie to compel the change.[1] So where a change of venue has been granted by an inferior court, upon regular application, duly heard and considered, the same court will not be compelled by mandamus to proceed with the trial of the cause, when a prompt and efficacious remedy exists by appeal. Indeed, the granting of the writ * 145 under such circumstances would be, in effect, the reversal of the order as a judicial proceeding, and it is not the function of a mandamus to reverse the orders of inferior courts.[2]

§ 184. While there are frequent instances of the exercise of the jurisdiction by mandamus over clerks of court, regarding them in the light of ministerial officers, to compel the performance of purely ministerial duties, yet even in this class of cases the relief will be withheld if the party aggrieved has a sufficient remedy by writ of error. Thus, mandamus will not lie to compel a clerk of court to make out and file a transcript of the proceedings in a cause, which, acting under the direction of the court, he has refused to do, even though the court may have erred in its order, since ample remedy is afforded by writ of error.[3]

§ 185. As regards the application of the general principle under discussion to courts which are vested with only appellate powers, and which are, by their constitution, devoid of original jurisdiction, it would seem to apply with peculiar force. And the rule is well established that such courts will in no case interfere by mandamus, except in aid of their appellate jurisdiction, and will refuse the writ in all cases where the questions involved can be tried on appeal from the subordinate to the appellate tribunal.[4]

[1] Flagley v. Hubbard, 22 Cal. 34.
[2] People v. Sexton, 24 Cal. 78.
[3] State v. Engleman, 45 Mo. 27.
[4] State v. Third District Court, 16

§ 186. While, as we have thus seen, the rule is well established that mandamus will not lie to control or correct the action of subordinate courts, where other remedy may be found equally efficacious, in Alabama the tendency of the courts has been toward a departure from the rule. And it is held in that state that as to questions which do not finally settle or determine the rights of the parties to the controversy in the lower court, and which are, therefore, not subject to review on error or appeal, mandamus is the appropriate remedy to control the action of the inferior court.[1] Thus, when
* 146 an attachment, issued in aid of, or as ancillary to an action at law, is improperly dismissed, the court may be compelled by mandamus to reinstate the proceedings.[2] A distinction is, however, recognized between cases where the attachment is ancillary to the main proceeding, and where the action is begun originally by attachment, and it is held that mandamus will not lie to compel the inferior court to quash an original attachment, which is the leading process in the case. Nor, in such case, will it be granted to compel the court to vacate an amendment which it has allowed to the original writ of attachment.[3] But where the court has erroneously refused to permit a suit to be revived, and has ordered it to be abated, it may be compelled by mandamus to rescind the order.[4] So the writ has been allowed to correct

La. An. 185; State *v.* Judge of Fourth District Court, 17 La. An. 282; Same *v.* Same, 19 La. An. 4.

[1] Kemp *v.* Porter, 6 Ala. 172. And see Wade *v.* Judge, 5 Ala. 130; Brazier *v.* Tarver, 4 Ala. 569; Boraim *v.* Da Costa, 4 Ala. 393; Hogan *v.* Alston, 9 Ala. 627; Casky *v.* Haviland, 13 Ala. 314; Brennan's Adm'r *v.* Harris, 20 Ala. 185; *Ex parte* Lowe, 20 Ala. 331; Shadden *v.* Sterling's Adm'rs 23 Ala. 518; *Ex parte* Ray, 45 Ala. 15; *Ex parte* Abrams, 48 Ala. 151; *Ex parte* Ware, 48 Ala. 223; *Ex parte* North, 49 Ala. 385; Bruce's Executrix *v.* Williamson, 50 Ala. 313; *Ex parte* Keeling, 50 Ala. 474; *Ex parte* Walker, 54 Ala. 577; *Ex parte* Alabama Gold Life Insurance Co. 59 Ala. 192; *Ex parte* Boothe, 64 Ala. 312.

[2] Boraim *v.* Da Costa, 4 Ala. 393; Gee *v.* Alabama Life Insurance Co. 13 Ala. 579; Hudson *v.* Daily, Ib. 722.

[3] *Ex parte* Putnam, 20 Ala. 592.

[4] State *ex rel.* Nabor's Heirs, 7 Ala. 459.

the erroneous action of an inferior court in dismissing a suit upon the application of a nominal plaintiff, which is carried on for the benefit of another person.[1] So, too, where the court has given an improper construction to a written agreement between the parties to a cause, and has allowed an amendment to the pleadings, in violation of the terms of such agreement, mandamus has been granted to compel the enforcement of the agreement.[2] And where no appeal lies from the order of an inferior court dismissing a cross-bill before the final determination of the cause, mandamus has been granted to compel the court to set aside its order of dismissal and to restore the cross-bill.[3] So it has been granted pending proceedings for divorce and alimony, to require the inferior court to make an order for the support of the wife, *pendente lite*, the court holding that if such relief were denied no other adequate remedy could be found.[4] So, too, it has been granted to compel a court to declare a bond for costs insufficient,[5] to vacate an order granting an injunction,[6] to set aside an order granting a new trial or a rehearing,[7] to set aside an order granting a supersedeas,[8] to vacate or set aside a writ of prohibition improperly granted,[9] to enter an order reviving an action against the administrator of a deceased partner,[10] and to reinstate a cause which has been improperly stricken from the docket.[11] It will * 147 thus be seen that in Alabama, a wider departure has been allowed from the general principle under discussion, than can be reconciled with the weight of authority or of sound reasoning. And it would seem, in that state, that the use of the

[1] Brazier *v.* Tarver, 4 Ala. 569.

[2] *Ex parte* Lawrence, 34 Ala. 446.

[3] *Ex parte* Thornton, 46 Ala. 384.

[4] *Ex parte* King, 27 Ala. 387.

[5] *Ex parte* Morgan, 30 Ala. 51.

[6] *Ex parte* Alabama Gold Life Insurance Co. 59 Ala. 192.

[7] *Ex parte* North, 49 Ala. 385; Bruce's Executrix *v.* Williamson, 50 Ala. 313.

[8] *Ex parte* Walker, 54 Ala. 577.

[9] *Ex parte* Ray, 45 Ala. 15; *Ex parte* Keeling, 50 Ala. 474; *Ex parte* Boothe, 64 Ala. 312.

[10] *Ex parte* Ware, 48 Ala. 223.

[11] *Ex parte* Abrams, 48 Ala. 151; State *ex rel.* Stowe, 51 Ala. 69.

writ has been extended until it has become, within the scope of its operation, as common a means of reviewing the decisions of an inferior tribunal as an appeal.[1] But, even in Alabama, the practice of resorting to the writ of mandamus for the correction of errors of inferior tribunals, has been strongly denounced.[2] And the tendency of later decisions is more in accordance with the general current of authority elsewhere. Thus, the writ has been refused when sought to vacate an order allowing amendments to a pleading.[3]

§ 187. A similar departure from the well-established rule denying the writ for the correction of errors, which are ordinarily redressed by writ of error or appeal, is noticeable in the State of Michigan. The cases illustrative of this departure from the general doctrine seem to rest in part upon the theory that the granting of a mandamus to direct the action of a subordinate judicial tribunal is the appropriate exercise of a supervisory judicial control, and is in the nature of appellate action, and in part upon the absence or inadequacy of other legal remedies. As illustrating this departure from the general rule, it has been held that mandamus was the appropriate remedy to compel a court to set aside a judgment which it had improperly refused to set aside.[4] So it has been granted to compel a court to vacate an order requir-

[1] See opinion of WALKER, C. J., in *Ex parte* Garland, 42 Ala. 559.

[2] See opinion of BYRD, J., in *Ex parte* Garland, 42 Ala. 566.

[3] *Ex parte* South & N. A. R. Co. 65 Ala. 599. The court, SOMERVILLE, J., say, p. 601: "It is proper to add that our past decisions have carried the principle of interference by mandamus with the interlocutory orders and motions of inferior courts quite as far as we are willing to extend it. Our inclination is rather to restrain than to enlarge such jurisdiction, as being more in harmony with the weight of authority and sound reasoning." And the writ has been refused to compel a court in which an indictment was pending to return the cause to the court from which it had been removed. *Ex parte* Dennis, 48 Ala. 304. And see *Ex parte* Reeves, 52 Ala. 394. So it has been refused to set aside a judgment by default upon merely technical grounds, no meritorious defense to the action being shown. *Ex parte* Bell, 48 Ala. 285.

[4] People *v.* Bacon, 18 Mich. 247. And see People *v.* Judge of Wayne Circuit Court, 22 Mich. 493.

ing a justice of the peace to make a return to an appeal, and to dismiss the appeal, the court being of opinion that there was no other adequate remedy.[1] So the writ has been allowed to compel a court to set aside an order dismissing an appeal from a justice of the peace.[2] And mandamus has been granted to direct a court to vacate an order requiring the production of books in a cause pending therein, such order not being reviewable upon writ of error.[3] The writ has also been allowed to direct a judge of an inferior court to set aside an order granting an injunction which had been made in excess of his authority, although it was admitted that an appeal would lie, the relief being allowed upon the ground of the delay and hardship which would result from remitting the party aggrieved to the remedy by appeal.[4] But the reasoning in support of these decisions does not seem to justify the conclusions reached, and the cases are plainly repugnant to the clear weight of authority, both English and American.[5]

§ 188. The review of the authorities cited in the * 148 preceding sections, has shown the doctrine to be too firmly established to be easily shaken, that the existence of another adequate and specific remedy is a sufficient

[1] People v. Judge of Allegan Circuit, 29 Mich. 487.

[2] Comstock v. Judge of Wayne Circuit Court, 30 Mich. 98. And in People v. Circuit Judge of Third Circuit, 19 Mich. 296, which was an application for a mandamus to compel the court to reinstate an appeal, which it had dismissed for want of jurisdiction, although the writ was refused because the relator had failed to show a clear, legal right, yet the jurisdiction to compel the inferior court to reinstate the appeal is not denied, and would seem to be impliedly recognized in the opinion of the court.

[3] People v. Judge of Circuit Court, 38 Mich. 351.

[4] Tawas & Bay Co. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

[5] For further illustrations of the use of mandamus in Michigan to compel inferior courts to vacate judicial orders, see People v. Wayne Circuit Judge, 39 Mich. 115; People v. Cass Circuit Judge, 39 Mich. 407; People v. Bay Circuit Judge, 41 Mich. 326; Baldwin v. Branch Circuit Judge, 48 Mich. 525; Michigan Central R. Co. v. Probate Judge, 48 Mich. 638. But the Michigan decisions are far from harmonious or reconcilable, and a contrary doc-

bar to the exercise of the jurisdiction by mandamus, and that the writ is never granted when the grievance complained of may be corrected on error or appeal. Closely allied to this doctrine, and founded upon the same reasoning, is the principle that mandamus will not be allowed to take the place or usurp the functions of an appeal or writ of error. Indeed, the principle is but the statement, in another form, of the doctrine last discussed, and it will be found to rest

trine has been recognized in People *v.* Branch Circuit Judge, 17 Mich, 67, and in People *v.* Wayne Circuit Judge, 20 Mich. 220, where mandamus, to compel an inferior court to vacate an order for a new trial, was refused. In Wiley *v.* Judge of Allegan Circuit Court, 29 Mich. 487, it is attempted to reconcile the Michigan decisions with the weight of authority elsewhere. The court, CHRISTIANCY, J., say, p. 495: "I think the true principle upon which a majority of the cases may be reconciled, is, that if the inferior court has acted judicially in the determination of a question of fact, or a question of law, at least if the latter be one properly arising upon the case itself, and not some collateral motion or matter,—that is, if the case or proceeding before it, upon the facts raised the particular question in such a shape as to give the power judicially thus to determine it,—then such determination, however erroneous, can not be reviewed, nor can any order the court may have made, or action it may have taken in consequence of it, be disturbed or reversed or reviewed by mandamus, if the action or order be such as would be justified by the same decision or determination when correctly made. In other words, such decision must, in a proceeding for a mandamus, be presumed to be right, because it is not the office or purpose of this proceeding to review or correct judicial decisions or judgments, which can only be accomplished by some other proceeding appropriate to that end. But if the case before the lower court does not, upon its facts or the evidence, legitimately raise the question of law or fact it has assumed to decide, so that the court could act judicially upon it, or so as to give the court the power judicially to make the decision it has assumed to make, then its action is not properly judicial, and no assumed determination of it, nor any order resting upon it, will preclude the remedy by mandamus, provided the case be in other respects a proper one for that species of remedy." This distinction, however, while it may serve to explain the conclusion reached by the court in some of the Michigan cases above cited, is inapplicable to others, since in many of the cases the order of the inferior court whose reversal was directed by mandamus, was plainly within the jurisdiction of the court, and was properly presented for its judicial action.

upon the same chain of reasoning and to be supported by the same overwhelming weight of authority. And while, in the exercise of its control over subordinate tribunals, a superior court may set them in motion, and compel them to act, it can not, by mandamus, revise their errors, or correct their mistakes. Nor will the writ be granted to reverse the decisions of inferior courts, upon matters properly within their judicial cognizance, or to compel them to retrace their steps, and correct their errors in judgments already rendered. In other words, it is not the province of the writ of mandamus to correct the judgments and decrees of inferior courts, and, by substituting the judgment or opinion of the higher tribunal in place of that of the lower, to usurp for mandamus substantially the same functions as a writ of error or appeal.[1]

§ 189. The application of the rule under discussion is in no manner affected by the fact that the * 149 subordinate court may have erred in its decision,

[1] Bank of Columbia *v.* Sweeny, 1 Pet. 567; *Ex parte* Hoyt, 13 Pet. 279; *Ex parte* Whitney, 13 Pet. 404; *Ex parte* De Groot, 6 Wal. 497; *Ex parte* Newman, 14 Wal. 152; *Ex parte* Schwab, 98 U. S. 240; *Ex parte* Perry, 102 U. S. 183; *Ex parte* Railway Company, 103 U. S. 794; *Ex parte* Hendree, 49 Ala. 360; *Ex parte* Gilmer, 54 Ala. 234; *Ex parte* Graves, 61 Ala. 381; *Ex parte* Schmidt, 62 Ala. 252; *Ex parte* Brown, 58 Ala. 536; *Ex parte* South & N. A. R. Co. 65 Ala. 599; Judges of Oneida Common Pleas *v.* The People, 18 Wend. 79, overruling People *v.* Superior Court of N. Y. 5 Wend. 114; People *v.* Judges of Dutchess Common Pleas, 20 Wend. 658; *Ex parte* Koon, 1 Denio, 644; *Ex parte* Ostrander, Ib. 679; Elkins *v.* Athearn, 2 Denio, 191; People *v.* Weston, 28 Cal. 639; Cariaga *v.* Dryden, 29 Cal. 307; Lewis *v.* Barclay, 35 Cal. 213; Jones *v.* Justices of Stafford, 1 Leigh, 584; People *v.* Pratt, 28 Cal. 166; People *v.* Moore, 29 Cal. 427; State *v.* Judge of Kenosha Circuit Court, 3 Wis. 809; County Court of Warren *v.* Daniel, 2 Bibb, 573; State *v.* Wright, 4 Nev. 119; Stout *v.* Hopping, 2 Har. (N. J.) 471; King *v.* Inhabitants of Frieston, 5 Barn. & Ad. 597; Queen *v.* Blanshard, 13 Ad. & E. N. S. 318; Little *v.* Morris, 10 Tex. 263; Dunklin Co. *v.* District Co. Court, 23 Mo. 449; Potter *v.* Todd, 73 Mo. 101; Williams *v.* Cooper Common Pleas, 27 Mo. 225; Blecker *v.* St. Louis Law Commissioner, 30 Mo. 111. See, *contra*, Hall *v.* County Court of Audrain Co. 27 Mo. 329; King *v.* Yorkshire, 5 Barn. & Ad. 667.

which it is sought to redress. Even though it is conceded that the judgment of that court is plainly erroneous, no ground is shown for the exercise of the jurisdiction by mandamus, if the question presented to the inferior court was properly within its jurisdictional powers.[1] The subordinate court having passed upon the question pending before it, its decision becomes a judicial determination, and, if erroneous, it is a judicial error, which it is not the province of a mandamus to correct.[2] And the fact that the decision complained of may seem to bear harshly and oppressively upon the party complaining, does not warrant a departure from the well-established rule.[3]

§ 190. Even if the party aggrieved has no right of appeal, or if a writ of error will not lie to the judgment or ruling of the court below, the same inflexible rule applies, and if the court properly had jurisdiction of the questions presented for its determination, the want of any remedy by error or appeal affords no ground for the exercise of the jurisdiction by mandamus. For, while it is true that the existence of another adequate remedy, either by error or appeal, bars relief by mandamus, yet the converse of the proposition is not necessarily true, and the want of such remedy does not, of itself, entitle the party aggrieved to this extraordinary relief.[4]

§ 191. Frequent applications of the doctrine under dis-

[1] Judges of Oneida Common Pleas *v.* The People, 18 Wend. 79; Cariaga *v.* Dryden, 29 Cal. 307; *Ex parte* Whitney, 13 Pet. 404; County Court of Warren *v.* Daniel, 2 Bibb, 573; Stout *v.* Hopping, 2 Har. (N. J.) 471; Queen *v.* Blanshard, 13 Ad. & E. N. S. 318; Foster *v.* Redfield, 50 Vt. 285.

[2] *Ex parte* Koon, 1 Denio, 644; *Ex parte* Ostrander, Ib. 679; Elkins *v.* Athearn, 2 Denio, 191.

[3] *Ex parte* Whitney, 13 Pet. 404.

[4] *Ex parte* Ostrander, 1 Denio, 679; Lewis *v.* Barclay, 35 Cal. 213; *Ex parte* Newman, 14 Wal. 152. Mr. Justice CLIFFORD, delivering the opinion of the court in the latter case, says: "Confessedly the petitioners are without remedy by appeal or writ of error, as the sum or value in controversy is less than the amount required to give that right, and it is insisted that they ought, on that account, to have the remedy sought by their petition.

cussion have been made in cases where it has been sought to compel an inferior court to reinstate an appeal from a subordinate court, which it has dismissed for want of * 151 jurisdiction, or for other cause. And with reference to this class of cases, it may be said generally, that, where the court, acting in a judicial capacity, has dismissed an appeal from an inferior tribunal, its order of dismissal is regarded as a judicial determination of the question, and, however erroneous, it is final and conclusive, and its correctness will not be questioned by mandamus.[1] Thus, where a court of general jurisdiction has dismissed an appeal from a justice of the peace, mandamus will not lie to compel it to proceed to a hearing and determination of the appeal, since the effect of the writ in such a case would be to review all the proceedings of the court below, and to convert the mandamus into a writ of error.[2] So where a circuit court of the United States has acted upon the questions presented by an appeal from a district court, and has dismissed the proceedings for want of jurisdiction, it will not be compelled by mandamus to entertain jurisdiction, and to proceed to a hearing of the cause.[3]

Mandamus will not lie, it is true, where the party may have an appeal or writ of error, but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or error."

[1] *Ex parte* Newman, 14 Wal. 152; State *v.* Wright, 4 Nev. 119; People *v.* Weston, 28 Cal. 639; People *v.* Judges of Dutchess Common Pleas, 20 Wend. 658. But see People *v.* Circuit Judge of Third Circuit, 19 Mich. 296.

[2] State *v.* Wright, 4 Nev. 119. And see People *v.* Weston, 28 Cal. 639; People *v.* Judges of Dutchess Common Pleas, 20 Wend. 658.

[3] *Ex parte* Newman, 14 Wal. 152. The court, Mr. Justice CLIFFORD pronouncing the opinion, say, p. 165 *et seq.:* "Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render in any pending

§ 192. In conformity with the rule denying the
* 152 writ for the purpose of correcting the errors of a lower court, it has been refused when it was sought to compel the inferior court to admit certain evidence which it had excluded.[1] Nor will it lie to correct or revise questions

case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act, or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy. Insurance Co. *v.* Wilson, 8 Pet. 302; United States *v.* Peters, 5 Cranch, 135; *Ex parte* Bradstreet, 7 Pet. 648; *Ex parte* Many, 14 How. 24; United States *v.* Lawrence, 3 Dall. 42; Commissioner *v.* Whitely, 4 Wal. 522; Insurance Co. *v.* Adams, 9 Pet. 602. * * * Superior tribunals may by mandamus command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed. If the duty is unperformed and it be judicial in its character, the mandate will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be done, or if it be ministerial the mandamus will direct the specific act to be performed. Carpenter *v.* Bristol, 21 Pickering, 258; Angell & Ames on Corporations, 9th ed., § 720. Power is given to this court by the judiciary act under a writ of error, or appeal, to affirm or reverse the judgment or decree of the circuit court, and in certain cases to render such judgment or decree, as the circuit court should have rendered or passed, but no such power is given under a writ of mandamus, nor is it competent for the superior tribunal under such a writ, to re-examine the judgment or decree of the subordinate court. Such a writ can not perform the functions of an appeal or writ of error, as the superior court will not, in any case, direct the judge of the subordinate court what judgment or decree to enter in the case, as the writ does not vest in the superior court any power to give any such direction, or to interfere in any manner with the judicial discretion and judgment of the subordinate court. *Ex parte* Crane, 5 Peters, 194; *Ex parte* Bradstreet, 7 Id. 634; Insurance Co. *v.* Wilson, 8 Id. 304; *Ex parte* Many, 14 Howard, 24. Viewed in the light of the return, the court is of the opinion that the rule must be discharged and the petition denied."

[1] King *v.* Inhabitants of Frieston, 5 Barn. & Ad. 597. But see King *v.* Yorkshire, Ib. 667.

of pleading which have been decided by the subordinate tribunal, or to compel the withdrawal of an issue already made up in a cause, and the substitution of a different issue, the appropriate remedy for all questions of this nature being by writ of error or appeal.[1] And an additional reason of equally binding force for refusing the writ in such case, is, that notwithstanding any opinion expressed by the superior court upon the proceedings in mandamus, the same * 153 question might again recur upon the final judgment in the case on writ of error.[2]

§ 193. The rule under consideration applies, also, to questions of costs, and their erroneous decision by the subordinate court affords no ground for the interposition of the extraordinary aid of a mandamus. It will not, therefore, be granted to compel a court to tax a particular bill of costs, or to order a particular person to pay the costs of a suit, even though it may have erred in its refusal to tax the costs, since the granting of the writ to thus correct the error of an inferior tribunal, would be a gross perversion of its * 154 appropriate office and functions.[3]

§ 194. In conformity with the general rule denying the writ for the correction of inferior tribunals by annulling what they have erroneously done, it will not lie to compel a county court to vacate an order, within its jurisdictional powers, directing the sale of lands of the county to a railway company, in payment of the subscription of the county to the stock of the railway.[4]

§ 195. The writ does not lie from a superior to an inferior court, to compel it to grant a mandamus which it has refused, since it is not the function of a mandamus to reverse the

[1] Bank of Columbia *v.* Sweeny, 1 Pet. 567.

[2] Bank of Columbia *v.* Sweeny, 1 Pet. 567.

[3] State *v.* Judge of Kenosha Circuit Court, 3 Wis. 809. And see *Ex parte* Nelson, 1 Cow. 417; People *v.* New York Common Pleas, 19 Wend. 113; Jansen *v.* Davison, 2 Johns. Cas. 72; Peralta *v.* Adams, 2 Cal. 594; *Ex parte* Many, 14 How. 24.

[4] Dunklin Co. *v.* District Co. Court, 23 Mo. 449.

decision of an inferior court, even where that decision is a refusal to grant a mandamus, the appropriate remedy, if any, being by writ of error.[1]

§ 196. The general principle discussed in the opening chapter, that a mandamus will not be granted when, if issued, it would prove unavailing, applies with equal propriety to cases where the relief is sought against the action of courts, and if it is apparent that the writ would prove unavailing, it will be withheld. Thus, where a court has, on a challenge to the array, directed a jury to be discharged and the cause to stand continued, mandamus will not be granted to compel the court to set aside its order and proceed with the trial of the cause, since the same challenge might be again interposed to another jury, and with the same result.[2]

§ 197. No principle of the law of mandamus is better established than that requiring the party aggrieved to show, as the foundation of the proceedings, that the specific act sought to be coerced is the duty of the person against whom * 155 the writ is asked, and the rule applies with equal force to cases where the relief is sought against courts and judges. And when it is apparent that the thing sought to be performed is not a duty resulting from the office of the judge, relief will be withheld. Thus, when the parties to a suit stipulate that certain facts shall be determined by referees, and that their report when submitted shall stand as the finding of the court, and shall be signed by the judge, he can not be compelled by mandamus to sign the report or finding, since it is not a duty incumbent upon him in an official capacity, but only by virtue of the stipulation entered into by the parties.[3]

§ 198. It is also a fundamental rule, that the relator must

[1] *Ex parte* De Groot, 6 Wal. 497. But in Arkansas the writ has been allowed to compel a court to issue a writ of *habeas corpus*, which it had improperly refused. Wright *v.* Johnson, 5 Ark. 687.

[2] Corporation *v.* Paulding, 4 Martin, N. S. 189.

[3] State *v.* McArthur, 23 Wis. 427.

show a clear and unquestioned right to the specific thing sought, and this rule is applied in all cases where the purpose of the proceeding is to enforce the action of judicial tribunals. And the writ will not issue to an inferior tribunal of a quasi-judicial nature, to compel it to grant a statutory right or franchise, such as the right of maintaining a ferry, to which the relator does not show himself to be entitled beyond doubt.[1]

II. Bills of Exceptions.

§ 199. Former remedy in chancery.
200. The jurisdiction now exercised by courts of law.
201. When mandamus granted to sign bill of exceptions.
202. Truth of bill to be determined by court below.
203. Writ refused when bill has once been signed.
204. Relator's laches may bar relief.
204 *a*. Writ will not go, if unavailing.
205. Writ only granted to judge who tried cause.
206. Absolute refusal to sign bill must be shown.
207. When granted to referee.
208. Effect of answer denying jurisdiction of higher court.
209. Evidence and instructions, when included in bill.
210. Limitation upon general rule; remedy by indictment or impeachment.
211. Subsequent alterations in bill not corrected by mandamus.
212. Jurisdiction not exercised over courts of chancery.
213. Nor over justice courts.
214. Bill need not be incorporated in writ; but should accompany it.
215. Jurisdiction extended to quasi-judicial tribunals.
215 *a*. Relief not granted in behalf of escaped criminal.

§ 199. The jurisdiction by mandamus to compel inferior courts to sign and seal bills of exceptions, or * 156 to amend such bills according to the truth of the case, seems to have been originally confined to the English court of chancery, and no instances are to be found of its exercise

[1] State *v.* Commissioners of Roads, 3 Port. 412.

signing the bill presented, the peremptory writ will not go, but in the absence of any return showing such reasons, the peremptory mandamus will issue.[1] And where it is shown that the court below has absolutely refused to sign a bill, and the relator avers that the matters therein contained are material to the determination of his rights on appeal, a proper case is presented for a mandamus to compel the signing of the bill.[2] But it is always a sufficient objection to the application for the writ, that the bill, as tendered to the court for its signature, was untrue, and where the relator does not deny the correctness of such a return, he is considered as having assented to it, and his application will be refused.[3]

§ 202. An important consideration to be borne in mind in the exercise of this branch of the general jurisdiction by mandamus, is, that the power of determining whether * 159 the particular bill of exceptions tendered is or is not true, rests exclusively with the court or judge before whom the cause was tried, and to whom the writ is directed, and the exercise of this power is beyond control by mandamus.[4] All that the judge can be required to do, is to sign such a bill as presents the facts in accordance with his knowledge and recollection, since this must necessarily be the test in determining what particular bill shall be signed. When, therefore, the judge returns that the bill as originally settled by him was settled truly, according to the facts of the case as he remembers them, nothing more can be required of him.[5] And when he has already signed one bill of exceptions, he can not be compelled by mandamus to sign another and a different one, since it is his own exclusive province to

[1] People *v.* Pearson, 3 Scam. 270.

[2] State *v.* Hall, 3 Cold. 255.

[3] People *v.* Judges of West Chester, Col. & C. Cas. 135; S. C. 2 Johns. Cas. 118; State *v.* Todd, 4 Ohio, 351.

[4] State *v.* Todd, 4 Ohio, 351; People *v.* Jameson, 40 Ill. 96; People *v.* Williams, 91 Ill. 87; State *v.* Noggle, 13 Wis. 380; State *v.* Babcock, 51 Vt. 570; Benedict *v.* Howell, 39 N. J. L. 221; Shepard *v.* Peyton, 12 Kan. 616.

[5] State *v.* Noggle, 13 Wis. 380.

determine the correctness of the bill which he shall sign.[1] And in no event should the writ direct a judge to sign a bill absolutely, as presented, but only to sign it after it has been duly settled.[2] So when the return shows that the respondent is willing to sign a true bill, but alleges that the bill as presented is not true, the peremptory writ will be refused, since the right to determine the truth of the bill rests exclusively with the judge himself.[3]

§ 203. Mandamus will not lie to compel the signing of a second bill of exceptions in the same cause, when one has already been signed and certified, embracing the same grounds, and the whole matter involved has been adjudicated by the appellate court.[4] And to an alternative mandamus directing a judge to sign a further bill of exceptions, it is a sufficient return that the bill already signed fully and fairly states all the facts attending the trial, to the best of the knowledge, information, and remembrance of the judge.[5] So where conflicting questions arise concerning the facts to be inserted in the bill, and the inferior court has already signed one bill, it will not be compelled to amend it, the question being regarded as within the peculiar knowledge of the judge before whom the cause was tried, and the superior tribunal will not, on proceedings in mandamus, hear and determine the facts on which the adjudication of the question must depend. Especially will the writ be refused to compel the * 160 amendment of a bill when the statutes of the state afford ample remedy for the party aggrieved in such a case, and he will be left to pursue his statutory remedy.[6]

§ 204. While, as we have seen, the jurisdiction by mandamus is freely exercised to compel an inferior court or judge to settle and sign a bill of exceptions, which has been refused,

[1] People v. Jameson, 40 Ill. 96.

[2] People v. Lee, 14 Cal. 510.

[3] Creager v. Meeker, 22 Ohio St. 207.

[4] Harris v. State of Georgia, 2 Geo. 290. See also People v. Wayne Circuit Judge, 32 Mich. 259.

[5] State v. Small, 47 Wis. 436.

[6] Jamison v. Reid, 2 G. Greene, 394.

yet the party aggrieved by such refusal must use due diligence in availing himself of this extraordinary remedy. And when there has been gross laches in allowing the bill to rest for many months before presenting it for signature, or when it has not been tendered until after the expiration of the time prescribed by law for that purpose, and after so long a period has elapsed that the judge has forgotten the facts involved in the case, and is unable to remember whether the allegations contained in the bill are true or false, no grounds exist for a mandamus, and the inferior court is justified in such case in its refusal to sign the bill.[1] Nor, in such case, will the fact that the parties to the cause have stipulated in writing to waive the statutory period for their mutual convenience, alter the case or vary the application of the rule, since such a stipulation can not have the effect of altering the law, or of depriving the judge of his rights as to the time of signing the bill.[2] And where the bill was not tendered to the judges at the trial, and not until the subsequent vacation, and was then presented to the judges individually, it was held that mandamus would not lie.[3]

§ 204 *a*. The relief will also be denied when the moving party has delayed his application until, under the rules, it is too late to avail himsef of the bill if signed, since the courts will not by mandamus command the performance of a useless act.[4] So the writ will not go when it is apparent from an inspection of the bill that it can not benefit the person seeking the relief.[5] Nor will it be granted to compel a judge to produce a bill of exceptions which is not in his possession, and to file it with the clerk of the court, and to make an order *nunc pro tunc* showing that it was filed in due time.[6]

[1] Engel *v.* Speer, 36 Geo. 258; State *v.* St Louis Court of Criminal Correction, 41 Mo. 598. And see Midberry *v.* Collins, 9 Johns. Rep. 346.

[2] Engel *v.* Speer, 36 Geo. 258; Haines *v.* Commonwealth, 99 Pa. St. 410.

[3] Midberry *v.* Collins, 9 Johns. Rep. 345.

[4] Clark *v.* Crane, 57 Cal. 629.

[5] Pitts *v.* Hall, 60 Geo. 389.

[6] State *v.* Redd, 68 Mo. 106.

§ 205. It being, as we have thus seen, an indispensable condition to the exercise of the jurisdiction in this class of cases, that the judge to whom the writ is directed should be personally cognizant of the facts which it is sought to incorporate in the bill of exceptions, mandamus will not lie to compel a judge to sign a bill in a case which was tried before his predecessor in office, since he can not, in such a case, have the necessary knowledge to enable him to * 161 pass upon the bill.[1] And the writ has been denied to compel a judge to settle a case for review by an appellate court, the judge having resigned after answer filed.[2] So when the judge is entirely ignorant of the contents of the bill, and returns that he does not know what took place at the trial, the cause having been tried, by agreement of counsel, before a private person, the writ will be withheld.[3]

§ 206. An absolute refusal on the part of the judge to perform his duty should be shown as a condition precedent to granting a mandamus to compel the signing of a bill of exceptions. And a mere qualified and temporary refusal or delay on the part of the judge, as by suggesting an adjournment to the parties in the hope of preventing further litigation, does not amount to such a refusal as to warrant interference by the extraordinary aid of a mandamus.[4]

§ 207. While mandamus would seem to be the appropriate remedy to compel a referee, to whom a cause has been referred for hearing, to settle a case and exceptions, yet it should be made apparent to the court granting the writ, that the exceptions, when so settled, will be in accordance with the facts of the case, and if the alternative writ fails to show this, the omission is fatal, and the peremptory writ will not be granted.[5]

§ 208. If the judge of an inferior court has been directed

[1] Fellows v. Tait, 14 Wis. 156.

[2] De Haas v. Newaygo Circuit Judge, 46 Mich. 12.

[3] State v. Larrabee, 3 Wis. 783.

[4] Irving v. Askew, 20 L. T. R. N. S. 584.

[5] People v. Baker, 35 Barb. 105

by an alternative mandamus to sign a bill of exceptions, but fails to make return to the alternative writ, and in lieu thereof files an answer denying the power of the court to take cognizance of the case, he will be compelled by a peremptory mandamus to sign the bill, the case being treated as one in which the authority of the higher court has been disregarded.[1]

§ 209. Where the court below was asked, on the trial of a cause, to charge the jury that there was no evidence tending to prove a certain proposition involved in the case, but the instruction was refused and exception taken, the court was compelled by mandamus to include in the bill of exceptions all the evidence bearing upon that particular proposition, * 162 plaintiff in error being clearly entitled to that right.[2]

But while it is conceded that the Supreme Court of the United States may issue the writ, in the exercise of its appellate jurisdiction, to compel a circuit court to sign a bill of exceptions, yet the writ will not be granted to compel the circuit court to incorporate into the bill so much of the instructions of the court to the jury as relates to the evidence in the case, the rulings of the court upon the propositions of law submitted by counsel in the instructions asked being all presented in the bill, and only the charge and comments of the court to the jury upon the evidence being omitted.[3]

§ 210. While, as we have already seen, the general rule is too well established to admit of controversy, that the discretion of the inferior court or judge as to what constitutes a true bill of exceptions will not be interfered with by mandamus, it does not follow that a judge is privileged to reject a bill which properly presents the case. And a return to the alternative writ which alleges that the relator had no authority to compel the respondent to sign the bill, since he himself must be the judge of the correctness of the exceptions, is insufficient, if it fails to show that the bill as presented did

[1] People v. Pearson, 3 Scam. 270.

[2] Crane v. Judge of Wayne Circuit Court, 24 Mich. 513.

[3] *Ex parte* Crane, 5 Pet. 190.

not state the facts truly, or that the exceptions were not taken in the proper manner and at the proper time.[1] But the writ may direct the judge to sign the bill as tendered if it fairly presents the facts; or if it does not fairly present the case, he may be directed to proceed to settle a bill, and when settled to sign it.[2] Nor is it a sufficient objection to the exercise of the jurisdiction, that the party aggrieved has a remedy against the judge refusing to sign the bill by indictment or impeachment, since a conviction or removal of the judge from office would not restore the person aggrieved to his rights, and would not, therefore, afford an adequate or specific remedy for his grievance.[3]

§ 211. Where, after signing the bill as originally presented to him, and after filing it in the clerk's office, the judge, of his own volition, makes material changes and alterations in the bill, mandamus will not lie to compel him to restore it to its original condition. In such case, the authority of the judge over the bill having entirely ceased upon his signing and certifying it, his subsequent action in making the changes and alterations, however * 163 unauthorized, is merely in his individual capacity, and is not done officially, as judge, and the writ is not granted against a private citizen.[4]

§ 212. Bills of exceptions being unknown to chancery practice, the writ will not issue to compel the signing of a bill in a chancery cause determined in an inferior court. Nor will it be granted to compel a court of chancery to inscribe in an order book, upon the application of one of the parties, an order which it has made in a cause.[5]

§ 213. The branch of the jurisdiction under discussion applies only to courts of record, and mandamus does not lie to compel a justice of the peace to sign and seal a bill of

[1] Etheridge *v.* Hall, 7 Port. 47.
[2] Page *v.* Clopton, 30 Grat. 415.
[3] Etheridge *v.* Hall, 7 Port. 47.
[4] State of Georgia *v.* Powers, 14 Geo. 388.
[5] *Ex parte* Story, 12 Pet. 339.

exceptions in a cause tried by him, in the absence of any law making it his duty to sign such bill.[1]

§ 214. As a matter of practice, where the writ is granted to compel an inferior court to sign and seal a bill of exceptions, it is not necessary to recite the bill in the alternative writ, and a motion to quash because of its omission will not be granted.[2] The writ, however, should be accompanied by the bill which was tendered for signature.[3] And as regards the practice on applications to compel amendments to bills of exceptions, it would seem to be the better course to refer the bill back in the first instance to the judge who settled it, in order that he may have an opportunity of reviewing it.[4]

§ 215. The jurisdiction by mandamus to compel the signing of bills of exceptions has been extended to inferior tribunals, which, though not properly courts, yet partake of a judicial nature and exercise judicial functions. Thus, where a special tribunal is organized under the statutes of a state for the trial of contested county elections, and during a trial before such tribunal exceptions are taken to its rulings, and a bill of exceptions is afterwards tendered for its sig-
* 164 nature, which is refused, a proper case is presented for a mandamus.[5] But it would seem that, on a return by the respondents in such case that they have made full compliance with the writ, the court will decline to hear proof offered by the relator, that the bill of exceptions, as signed, was not true.[6]

§ 215 *a*. An application for a mandamus to procure the signing of a bill of exceptions will not be sustained in a case where, after a trial for felony, the accused, being found guilty,

[1] Ohio v. Wood, 22 Ohio St. 537.

[2] People v. Judges of Westchester, 4 Cow. 73.

[3] Creager v. Meeker, 22 Ohio St. 207; People v. Dickson, 46 Cal. 53.

[4] Delavan v. Boardman, 5 Wend. 132.

[5] State v. Sheldon, 2 Kan. 322.

[6] See note to State v. Sheldon, 2 Kan. 322.

escapes from custody; since the courts will not encourage evasions of justice by affording to escaped convicts the means of reviewing their convictions.[1]

III. Attorneys.

§ 216. Mandamus to restore attorneys.
217. Limitations upon the exercise of the jurisdiction.
218. Allowed where court has exceeded its jurisdiction; or decided erroneously.
219. Actual amotion of attorney must be shown.
220. Want of notice to attorney before removal.
221. Rule in Alabama; affidavit, requisites of.
222. Distinction between office and employment.
223. Mandamus not granted to compel admission to practice.
224. Granted to compel appointment of attorney to defend *non compos*.

§ 216. Questions of considerable interest to the legal profession have frequently occurred in determining how far superior courts of appellate jurisdiction and of final resort, may interfere by mandamus with the control of inferior courts of general jurisdiction over attorneys practising therein, and with the removal of attorneys from their office. In England, the jurisdiction of the kings bench by mandamus to restore an attorney to his office is of comparatively ancient origin.[2] In this country, the powers of the courts over attorneys, and the status of attorneys as officers of the court, are generally regulated by statute in the different states, and the decisions are not wholly reconcilable as to the power of the higher courts to control by mandamus the lower tribunals in the removal of attorneys from their office.

§ 217. It would seem, upon principle, that an order of dismissal, deposing an attorney from his office, is in its nature a judicial act, and is or should be performed in * 165

[1] People v. Genet, 59 N. Y. 80.

[2] See Hurst's Case, 1 Lev. part I. 75.

the exercise of a judicial discretion. And it is well settled, as a common-law doctrine, that this power rests exclusively with the court, which must itself determine, in the absence of statute, the qualifications of its officers and for what cause they shall be removed.[1] It may be said, generally, that the revisory tribunal, even if it possesses undoubted authority to control the inferior court as to the removal of its attorneys, will only exercise this authority in a plain case, and when the conduct of the court below is irregular, or flagrantly improper.[2] And the courts are less inclined to interfere when the complaint is not of an absolute removal, but only of a suspension from practice, which has nearly expired, and after which the attorney may be restored by the court itself.[3] And where, by statute, it is made the duty of attorneys and counselors to "maintain the respect due to courts of justice and judicial officers," and it is provided that a violation of this duty shall constitute cause for removal, it rests with the court below to determine as a judicial question what acts constitute a violation of the statute, and sufficient cause for removal. When, therefore, the court has decided that the offending party has been guilty of such acts as constitute a violation of the statute, and has ordered his removal, its decision will not be controlled by mandamus.[4]

§ 218. While, as we have seen in the preceding
* 166 section, the writ will not lie to control the exercise of the judicial discretion of an inferior court in removing an attorney, yet if the court has manifestly exceeded its authority and acted outside of its jurisdiction, as if it has disbarred an attorney for a contempt committed by him

[1] *Ex parte* Secombe, 19 How. 9.

[2] *Ex parte* Burr, 9 Wheat. 529, And see Walls *v.* Palmer, 64 Ind. 493.

[3] *Ex parte* Burr, 9 Wheat. 529.

[4] *Ex parte* Secombe, 19 How. 9. And see Commonwealth *v.* The District Court, 5 W. & S. 272, where mandamus to restore an attorney to the rolls was refused on the ground that, the admission of an attorney being a judicial act, his dismissal is equally so, and that, in principle, there can be no distinction between the two cases.

before another court, mandamus will lie to restore the attorney, since no amount of legal discretion can supply a defect or want of jurisdiction.[1] And it has been held, that where the inferior court has decided erro- * 167 neously upon the testimony in disbarring an attorney, and a plain case of hardship is made to appear, mandamus will lie, and that the superior court is only precluded from interfering when the discretion of the lower court has been exercised in a reasonable manner.[2] It is difficult, however, to reconcile this doctrine with the weight of authority, since it sanctions the use of mandamus to control or correct the exercise of judicial discretion by the inferior court, a use of the remedy which, as we have already seen,[3] is foreign to its scope and purpose.

§ 219. To warrant the interference by mandamus in this class of cases, there must have been an actual removal from the office of attorney. And a mere refusal of the court to listen to an attorney in a single case, or even statements on the part of judges of such court that the attorney will not be allowed to practice before them, will not justify the writ, when there has been no action on the part of the court actually disbarring the relator.[4]

§ 220. Mandamus is the appropriate remedy to compel an inferior court to restore an attorney to the rolls, when he has been improperly stricken therefrom upon an *ex parte* proceeding, without notice or opportunity either for * 168 defense or explanation. And while, in the absence of statutory regulations, it is conceded that courts of original jurisdiction have control over their attorneys, practising before them, with authority to strike them from the rolls, yet this authority is to be exercised only after affording the party

[1] *Ex parte* Bradley, 7 Wal. 364. And see People *v.* Justices of Delaware Common Pleas, 1 Johns. Cas. 181; *Ex parte* Robinson, 19 Wal. 505.

[2] State of Florida *v.* Kirke, 12 Fla. 278.

[3] See § 156 and cases cited.

[4] People *v.* Dowling, 55 Barb. 197.

accused an opportunity of being heard in defense. When this has not been done, mandamus is regarded as the only adequate remedy to meet the case, and the granting of the writ in such a case in no manner interferes with the exercise of the judicial discretion of the court below.[1] But where, by statute, it is provided that the proceedings for the removal of an attorney may be taken by the court, on its own motion, and for matter within its knowledge, and the court accordingly acts on its own motion, and removes an attorney for offenses committed in open court, and then decides that in such a case no notice is necessary and proceeds without it, its decision, being made in the exercise of judicial authority, upon a subject-matter within its jurisdiction, can not be revised or annulled by mandamus.[2]

§ 221. It is held in Alabama, that if an attorney, who has been duly admitted to practice in all the courts of the state, is improperly prohibited from practising in a local and inferior court, he may be restored by mandamus, but that it is not sufficient to allege that the relator is a practitioner of law in all the courts of the state, both of state and fed-
* 169 eral jurisdiction, without alleging that he is duly and regularly licensed and that he has taken the oath.[3] And the affidavit in support of the application for mandamus to restore an attorney to the rolls, is insufficient if it does not show that the court below acted improperly in the removal, or that the fact charged against the attorney and on which he was removed was founded in error or mistake.[4]

§ 222. In the exercise of the jurisdiction under discussion, a distinction is taken between interfering to restore an attorney, whose position is that of an officer of the court, and cases of mere employment; and while, in the former class of cases, the jurisdiction is often exercised, in the latter class, the courts will not interfere. Thus, it is held that the posi-

[1] People *v.* Turner, 1 Cal. 143.
[2] *Ex parte* Secombe, 19 How. 9.
[3] Withers *v.* The State, 36 Ala. 252.
[4] *In re* Gephard, 1 Johns. Cas. 134.

tion of a proctor of doctors commons in England is not an office, properly speaking, but merely an employment, subjecting the person to the original jurisdiction of the court of doctors commons. When, therefore, such court, acting within its powers, has suspended a proctor, mandamus will not lie to restore him.[1]

§ 223. The question of the admission of persons to practice as attorneys in the courts has sometimes given rise to applications for the extraordinary aid of mandamus to compel the admission of applicants. This question, however, being regarded as a judicial one, and the courts in passing upon the admission of attorneys being regarded as exercising judicial rather than ministerial functions, the exercise of their prerogative will not be disturbed or revised by a superior court. When, therefore, the subordinate court has refused to admit an applicant, mandamus will not lie to compel the admission.[2] And in England, mandamus will not go to one of the inns of court to compel admission to the degree of barrister-at-law, these inns being merely voluntary societies submitting to government, and the proper method of redress in such a case being by appeal to the * 170 twelve judges.[3]

§ 224. It has been held an appropriate exercise of the jurisdiction by mandamus to grant the writ for the purpose of compelling a subordinate court to appoint an attorney to defend a person who is *non compos*, and against whom suit is brought.[4]

[1] Leigh's case, 3 Mod. Rep. 332.

[2] Commonwealth v. The Judges, 1 S. & R. 187. This decision was rendered under a statute of the state providing that "there may be a competent number of persons, of an honest disposition and learned in the law, admitted by the justices of the respective courts, to practice as attorneys there."

[3] King v. Benchers of Grays Inn, Doug. 353.

[4] *Ex parte* Northington, 37 Ala. 496.

IV. State and Federal Courts.

§ 225. Mandamus not granted to remove cause from state to federal court.
226. Reasons in support of the rule.
227. Writ not granted from federal to state courts to compel removal.
227 *a*. Removal of causes further considered.
228. Distinction between removal of cause and accepting surety for removal.
229. Mandamus in aid of proceedings in federal courts.

§ 225. Our peculiar system of state and federal courts, with their different jurisdictions, each acting independently of the other, has given rise to questions of much nicety in cases falling within the jurisdiction of either forum, and in some instances the aid of mandamus has been invoked for their determination. The most frequent cases of this kind have been where mandamus was sought to compel the removal of a cause from the state to the federal courts, under the acts of congress providing for such removal by a non-resident defendant sued in the state courts. While the authorities are far from reconcilable upon this subject, the better considered doctrine, supported by the clear weight of authority, undoubtedly is, that when the question of removal is properly presented to the state court and passed upon by that tribunal, its decision, however erroneous, is not void and can not be reviewed by proceedings in mandamus in the higher state court. And mandamus will not lie from the superior courts of the different states, to compel the subordinate courts either to revise, reverse, or rescind their action upon such applications, or to compel them to proceed * 171 in any manner inconsistent therewith, when the case has been properly presented to them and they have either granted or refused the application for removal.[1] Any

[1] Francisco *v.* Manhattan Insurance Co. 36 Cal. 283; Shelby *v.* Hoffman, 7 Ohio St. 450; State *v.* Curler, 4 Nev. 445; People *v.* Judges of New York Common Pleas, 2 Denio, 197; People *v.* Judge of Jackson

attempt to control or reverse by mandamus the rulings of the inferior courts upon such applications, may justly be regarded as a flagrant violation and abuse of the well-established functions of the writ.[1]

§ 226. Various reasons have been assigned in support of the rule by the different courts in which it has been recognized and applied. Thus, the writ has been refused in such cases on the ground that, if any coercive action should be necessary to procure the removal, it should naturally come from the United States courts, rather than from the state tribunals.[2] So it has been refused on the ground that, if granted in such cases, it would necessarily lead to * 172 a conflict of jurisdiction between the state and federal

Circuit Court, 21 Mich. 577. But see, *contra*, Brown *v.* Crippin, 4 Hen. & M. 173; State *v.* Judge of Thirteenth District, 23 La. An. 29. And see Orosco *v.* Gagliardo, 22 Cal. 83. In Kennedy *v.* Woolfolk, 1 Overt. 453, the court were divided as to whether the duty of the state court to order the removal of a cause to the federal court upon proper application was a ministerial or a judicial duty. And in Campbell *v.* Wallen's Lessee, Mart. & Yerg. 266, it was held that where the state court had refused to allow the removal, its decision might be reversed on appeal to the supreme court of the state, which court might order the cause to be sent to the federal court.

[1] Francisco *v.* Manhattan Insurance Co. 36 Cal. 283.

[2] People *v.* Judge of Jackson Circuit Court, 21 Mich. 577. CAMPBELL, C. J., denying the jurisdiction in such cases, says: "We are also unable to discover any propriety in resorting to the writ of mandamus of this court to correct the action of a circuit court in a case, under the act of congress. If any coercive action should be deemed necessary to transfer proceedings into the courts of the United States, it should naturally come from United States authority; and if the result can not be reached without the intervention of some writ, we find it difficult to believe that the remedy can be dependent on the discretion of a state court. In all cases where writs are expressly mentioned for purposes of removing cases into United States courts, they issue returnable there. There is no writ of certiorari or mandamus known to the common law, issuing from one jurisdiction to courts within it for the removal of causes into another jurisdiction. Certiorari is the proper writ for removing records from one court into another for trial, and is the writ expressly authorized to be issued by United States courts, for removing thither certain cases from state courts under the act of 1833. 4 U. S. Stat. 633. But whether cer-

courts.[1] So, too, it has been withheld for the reason that mandamus is not a proper remedy to review the action or to correct the errors of inferior courts upon questions which they have judicially determined, and that if the court has erroneously refused to allow the removal of the cause to the federal courts, and has entertained jurisdiction and proceeded to trial and judgment, the proper remedy is by writ of error or appeal, to review the rulings and judgment of the court below.[2]

§ 227. As regards the power of the circuit courts of the United States over the state courts of general jurisdiction, to compel them to allow the removal of a cause into the federal courts, while the existence of such a power has been asserted as necessary for the exercise of the jurisdiction of the United States courts,[3] yet the doctrine may now be regarded as too

tiorari or mandamus would be appropriate for this purpose, it is certainly more seemly that they should not depend on the discretion of any tribunal not holding its commission from the authority creating the right of removal. The United States supreme court has never, that we can find, decided expressly, upon a case arising under the statute in question, that the circuit courts of the United States may issue the proper writ, if any is required, but the principle has been asserted distinctly that a summary remedy exists, and, if so, there can be no special difficulty in ascertaining it. Gordon v. Longest, 16 Pet. R. 97. And we think the view taken by the supreme court of New York in the case of The People v. The Judges of the N. Y. Common Pleas (2 Denio, 197), refusing a mandamus, is in accordance with good sense. We should feel disposed to go as far as possible to prevent a failure of any right, but we do not perceive any such necessity in these cases." Still stronger ground is taken in The People v. Judges of New York Common Pleas, 2 Denio, 197, where it is asserted as the undoubted prerogative of the courts of the United States to issue the writ of mandamus in all cases necessary for the exercise of their jurisdiction, and hence in the class of cases under consideration. But the authority of this case, upon this point, is entirely overborne by Hough v. Western Transportation Co. 1 Bissell, 425.

[1] Francisco v. Manhattan Insurance Co. 36 Cal. 283.

[2] Shelby v. Hoffman, 7 Ohio St. 450; State v. Curler, 4 Nev. 445.

[3] Spraggins v. County Court of Humphries, Cooke, 160; People v. Judges of New York Common Pleas, 2 Denio, 197. And see People v. Judge of Jackson Circuit Court, 21 Mich. 577.

well established to admit of question, that such power does not exist. And while it is believed to be within * 173 the power of congress to confer upon the circuit courts of the United States jurisdiction to compel by mandamus the removal of causes from the state into the federal courts, yet such power is not possessed by the circuit courts, either under the judiciary act of 1789, or under the act of 1866,[1] providing for the removal of cases from the state to the federal courts. They will not, therefore, attempt by mandamus to review the decision of a state court upon an application of this nature, or compel it to remove a cause to the federal tribunal.[2] The appropriate remedy in such case is by appeal to the supreme court of the state, and thence by writ of error to the Supreme Court of the United States.[3]

[1] 14 U. S. Statutes at Large, 306.

[2] Hough *v.* Western Transportation Company, 1 Bissell, 425; *In re* Cromie, 2 Bissell, 160; Ladd *v.* Tudor, 3 W. & M. 326. But see, *contra*, Spraggins *v.* County Court of Humphries, Cooke, 160.

[3] Hough *v.* The Western Transportation Co. 1 Bissell, 425. This was an application by the defendant, a foreign corporation, sued in the state courts, to the circuit court of the United States, for a mandamus to compel the state court to remove the cases to the federal tribunal. The right of the circuit court to interfere in such case was denied by DRUMMOND, J., in an exhaustive opinion which may be regarded as having set at rest the previously unsettled authorities upon the subject. He says: "The question is, whether, under the circumstances of the case, the mandamus will lie. I think it will not. Of course, in expressing this opinion, it is not necessary for the court to determine whether the state court decided properly in refusing the application made by defendant. * * It is a little singular that throughout our judicial history there has been, so far as we have been able to ascertain, but one application made to the circuit court of the United States for this writ, where a state court has refused to comply with the 12th section of the judiciary act. That case was the case in Tennessee, and is referred to in the case of The People *v.* The Judges of the New York Common Pleas, reported in 2 Denio, 197. This case grew out of the case of Kanouse *v.* Martin, 15 How. 198, which was commenced in a state court of New York, and where the application was made to the state court to remove the cause to the circuit court of the United States. After the application was made the plaintiff amended his declaration so as to make the amount in controversy less than five hundred dollars, and thereupon the application was refused. The case

§ 227 *a*. Mandamus has been allowed as a corrective of matters growing out of an improper removal of a cause from a state to a federal court, and not falling within the judicial discretion of the court to which the writ was directed. Thus, when a criminal action was improperly removed from a state to a federal court, mandamus was granted by the Supreme Court of the United States, upon the application of the

went to the highest court of the state, and thence to the Supreme Court of the United States. The Supreme Court of the United States reversed the case on the ground that the application should have been granted, and that whenever it was made the statute interposed, and declared that if it was within the meaning of the 12th section of the judiciary act, it was not competent for the state court to take any other step in the case, and that it did, after the application was made, by allowing this amendment, and that was an erroneous act. Judgment was therefore reversed, and it was held that it was the duty of the court to look into the whole record and to determine whether the case was within the provision of the 12th section of the judiciary act. That was a case, as I understand it, in which the counsel for defendant, instead of applying to the circuit court of the United States for a mandamus, applied to the supreme court of the state for a mandamus. The opinion of the court was given by BRONSON, C. J., denying the application, on the ground that the 14th section of the judiciary act gave the circuit court of the United States power to issue the writ of mandamus, and therefore the application should be made to that court and not to the supreme court. In this opinion they refer to the only case to which the notice of this court has been directed, which is the case of Spraggins *v.* County Court of Humphries, Cooke, 160. The judge says: 'I am not aware that any of the federal courts have questioned their power to act in the same manner. If they have power, there is no reason why this court should interfere.' He says, also, 'I am aware that the court of appeals in Virginia awarded a mandamus to an inferior court in that state to compel the removal of a cause into the circuit court of the United States. Brown *v.* Crippin, 4 Hen. & Munf. 173.' 'But,' he says, 'until it shall be settled that the federal courts want the power to issue all such writs as may be necessary for the exercise of the jurisdiction conferred upon them by the constitution and laws, this court can not act without the appearance of making an officious tender of its services.' It was for this reason that the motion for a mandamus was refused. I admit that the case proceeds upon the ground that the proper source to apply to for a writ of mandamus was the circuit court of the United States, and not to the state court. The question then is whether that is a proper source. I think that the view of the judge was incorrect. * * * It will be seen, from what

state, to the United States district judge, to cause the re-delivery to the state authorities of prisoners who had been improperly delivered to the United States marshal under the petition for removal.[1] Where, however, a circuit court of the United States has denied a motion to remand a cause which has been removed from a state court, mandamus will not lie from the Supreme Court of the United States to the circuit court to grant the motion to remand.[2]

§ 228. A distinction has been recognized between the action of a state court in refusing to order the * 174 removal of a cause to the federal court, and in refusing to accept surety tendered for such removal. And while, as we have just seen, mandamus will not lie to the state court from its appellate tribunal in the former case, the writ may be granted in the latter. Thus, under the act of congress of March 3, 1863, providing for the removal to the federal courts of suits begun in the state courts, for acts done under the authority of the president of the United States * 175 during the rebellion, the act of accepting surety for the removal is not regarded as an act of judicial discretion, and if the court refuses to accept of surety, and refuses to relinquish jurisdiction of the case, mandamus will lie.[3]

§ 229. Mandamus lies from the Supreme Court of the United States to the court of claims, to compel the latter to hear and determine a motion for a new trial.[4] And

has been said, that there is a remedy for the party; he is not without redress; he can take his exception; the supreme court of the state can give him redress if the lower court has decided wrong, and if that court will not, the Supreme Court of the United States may. It is true this is a circuitous way to have any supposed wrong remedied, but still I think it is the only way in which it can be done. The congress of the United States have not seen fit to give this summary remedy by writ of mandamus, if it was competent for them to do it, and until they have done that, either by express language or by necessary implication, I do not think that this court ought to exercise a doubtful power."

[1] Virginia *v.* Rives, 100 U. S. 313.

[2] *Ex parte* Hoard, 105 U. S. 578.

[3] State *v.* Court of Common Pleas, 15 Ohio St. 377.

[4] *Ex parte* United States, 16 Wal. 699.

the writ will lie from the Supreme Court to a district court of the United States, to compel it to execute its decree, notwithstanding a state legislature has attempted to annul such decree on the ground that the federal court had not jurisdiction, since the states will not be allowed to determine the jurisdiction of the United States courts.[1] So the state courts may, and sometimes will, interfere by mandamus in aid of a decree of the federal courts. Thus, where the United States district court, sitting in bankruptcy, decrees a sale of mortgaged premises and a cancellation of the mortgages, but the recorder of mortgages refuses to release them in compliance with such order, mandamus will lie from the state court to compel obedience to the mandate of the district court.[2] And where it is the plain and imperative duty of a county treasurer, under the laws of the state, to pay a judgment against the county out of funds in his hands which have been collected for that purpose, the fact that the judgment was rendered in the federal courts will not prevent the state courts from interfering by mandamus to * 176 enforce payment.[3] So the writ will lie from the state courts to compel the authorities of a town to levy a tax for the payment of a judgment recovered against the town in the United States courts.[4]

[1] United States v. Peters, 5 Cranch, 115.

[2] Conrad v. Prieur, 5 Rob. La. 49; Benjamin v. Prieur, 8 Rob. La. 193; Diggs v. Prieur, 11 Rob. La. 54

[3] Brown v. Crego, 32 Iowa, 498.

[4] State v. Supervisors of Beloit, 20 Wis. 79; State v. City of Madison, 15 Wis. 30.

V. Ministerial Functions of Courts.

§ 230. Mandamus lies for ministerial duties.
231. When granted to compel approval of bonds.
232. When court may be compelled to audit or pay claims.
233. Erection of public buildings.
234. Illustrations of the general rule.
235. Writ granted to compel entering of judgment.
236. Judgment on report of referee; effect of appeal.
237. Bridges; highways; railroads.
238. When granted to clerks of court.

§ 230. It has already been shown that as to all matters of a judicial nature and resting within the * 177 limits of judicial discretion, mandamus is not an appropriate remedy, and that the courts uniformly refuse to interfere by this species of relief, either to control or regulate in any manner the discretion of inferior courts * 178 as to matters properly presented to them in a judicial capacity. But it not unfrequently happens that duties devolve upon courts or judges, either by operation of law, or by positive statute, which partake more of a ministerial than of a judicial nature, and when the duty is so plain and imperative that no element of discretion can enter into its performance. And while the courts uniformly refuse to interfere with the discretion of inferior tribunals in the performance of their duties, yet as to acts to be performed by a court or judge in a merely ministerial capacity, or as to duties which are obligatory upon them by express statute, and as to which there can be no dispute, and no element of discretion, mandamus is an appropriate remedy, and will be granted to compel the performance of the act or duty.[1]

[1] State v. Burgoyne, 7 Ohio St. 153; State v. Lafayette Co. Court, 41 Mo. 221; S. C. Ib. 545; State v. Howard Co. Court, Ib. 247; State v. County Court of Texas Co. 44 Mo. 230; Beck v. Jackson, 43 Mo. 117; County of Boone v. Todd, 3 Mo. 140, (2nd edition 103); Madison Co.

§ 231. The decisions are not wholly reconcilable as to whether the rule under discussion is applicable to cases of official bonds, which are by law required to be approved by a particular court or judge. Upon the one hand, it is held that where public officers are required by law to give a bond with satisfactory surety to the state, before entering upon the performance of their duties, and a particular court is designated, whose duty it is made to approve the bond, this approval is not the exercise of such a judicial function as to preclude control by mandamus. The approval or rejection of the bond in such case, although coupled with some degree of discretion, is held to be essentially a ministerial act, and hence subject to control by mandamus.[1] So where it is made the duty of a court to approve the bond of its own clerk, it is held that mandamus will lie, the proceeding being regarded as one to compel the court to perform its plain duty. And in such case the commission issued by the governor of the state to the relator is treated as *prima facie* evidence of his title to the office.[2] Upon the other hand, it is held, and such doubtless is the better doctrine, that the duty of approving the official bonds of public officers, when imposed by law upon inferior courts, is a duty of a judicial nature, requiring the exercise of judgment and discretion, and hence not subject to be enforced by mandamus.[3] And in all such cases, it would

Court *v.* Alexander, 1 Miss. 523; Cuthbert *v.* Lewis, 6 Ala. 262; Chicago, B. & Q. R. Co. *v.* Wilson, 17 Ill. 128; Commonwealth *v.* Court of Sessions, 2 Pick. 414; Manor *v.* McCall, 5 Geo. 522; Dawson *v.* Thurston, 2 Hen. & M. 132; Manns *v.* Givens, 7 Leigh, 689; State *v.* Judges of Salem Pleas, 4 Halst. 246; Randolph *v.* Stalnaker, 13 Grat. 523; Commonwealth *v.* Bunn, 71 Pa. St. 405; Commonwealth *v.* Justices of Fairfax Co. 2 Va. Cas. 9; Commonwealth *v.* Justices of Kanawha Co. Ib. 499. See also Life & Fire Ins. Co. *v.* Wilson's Heirs, 8 Pet. 291; Illinois Central R. Co. *v.* Rucker, 14 Ill. 353.

[1] State *v.* Lafayette Co. Court, 41 Mo. 221; S. C. Ib. 545; State *v.* County Court of Texas Co. 44 Mo. 230; Beck *v.* Jackson, 43 Mo. 117.

[2] Beck *v.* Jackson, 43 Mo. 117.

[3] *Ex parte* Harris, 52 Ala. 87, overruling *Ex parte* Candee, 48 Ala. 386; State *v.* Ely, 43 Ala. 568; *Ex parte* Thompson, 52 Ala. 98.

seem to be the more correct practice, not to command the inferior court peremptorily in the first instance to approve the bond tendered, but the alternative writ should be so framed as to command the court to proceed and act upon the application, and to hear the evidence offered as to the sufficiency of the sureties, and to approve them if sufficient.[1] Nor will mandamus lie to compel a court to accept an official bond after the day fixed by law for giving such bond.[2] And when the court has passed upon and adjudicated the question of the sufficiency of a bond, its action will not be controlled or reviewed by mandamus.[3]

§ 232. In some of the states the auditing and pay-
* 179 ment of claims for public services rendered to a county are made the duty of the inferior courts, such as county courts, and in such cases the general rule applies, and the duty may be enforced by mandamus.[4] Thus, where a county court is required by law to settle and adjust all claims against the county for services rendered, the writ will be granted to compel such court to proceed and audit a claim for services duly performed.[5] And such courts may be required by mandamus to proceed to adjudicate upon claims against the county, which they have improperly refused to pass
* 180 upon or allow. But where the amount of the claim is a matter whose determination rests in the judicial discretion of the court, it will not be directed to allow the claim at a specific sum, but only to proceed and audit the claim, leaving the court untrammeled as to the amount which shall be allowed.[6] Where it is made the duty of a court to issue its warrant upon the county treasurer, for the payment of a claim against the county which has been properly

[1] State *v.* Howard Co. Court, 41 Mo. 247.

[2] Lowe *v.* Phelps, 14 Bush, 642.

[3] See § 164 *ante*, and cases cited.

[4] Madison Co. Court *v.* Alexander, 1 Miss. 523; County of Boone *v.* Todd, 3 Mo. 140, (2nd edition, 103). And see Cuthbert *v.* Lewis, 6 Ala. 262.

[5] Madison Co. Court *v.* Alexander, 1 Miss. 523.

[6] *Ex parte* Taylor, 5 Ark. 49; Brem *v.* Arkansas Co. Court, 9 Ark. 240.

allowed, mandamus will lie for a refusal to perform this duty.[1] And the same rule applies where the duty of directing the payment of a claim against a county is incumbent upon an inferior tribunal of a quasi-judicial nature, and if the validity of the claim has been established by the proper authority, no element of discretion remains to be exercised in drawing the order for payment, and the duty may be enforced by mandamus.[2]

§ 233. The erection of public buildings sometimes affords occasion for the exercise of the jurisdiction, and where it is made by statute the imperative duty of an inferior local court to provide a suitable house of correction for the county, the duty not being of a judicial nature, and not calling for the exercise of any discretion, its performance may be compelled by mandamus.[3] So where commissioners are appointed by act of legislature to provide for the erection of county buildings, and the duty of levying a tax for defraying the expenses of the commissioners is made incumbent upon a local court, mandamus will lie to enforce its performance, it being a fixed and specific duty, not resting in the discretion of the court.[4]

§ 234. Where it is made incumbent upon the justices of a county court to receive proof of certain deeds and to admit them to record, their duties in this regard are treated as purely ministerial and their performance may be coerced by * 181 mandamus.[5] And where it is the duty of a county court to admit to record the report of the county surveyor in relation to lands sold by the sheriff for unpaid taxes, and the court is without authority to inquire into the regularity or validity of the sheriff's sale, mandamus will be granted to compel the admission of the report for record.[6]

[1] County of Boone v. Todd, 3 Mo. 140, (2nd edition, 103).

[2] Cuthbert v. Lewis, 6 Ala. 262.

[3] Commonwealth v. Court of Sessions, 2 Pick. 414.

[4] Manor v. McCall, 5 Geo. 522.

[5] Dawson v. Thurston, 2 Hen. & M. 132; Manns v. Givens, 7 Leigh, 689.

[6] Randolph v. Stalnaker, 13 Grat. 523.

§ 235. The writ has sometimes been granted to compel the entering of judgments when nothing remained but the mere ministerial duty of making the proper entry.[1] And when an inferior court, acting in a judicial capacity, has found all the facts necessary to a judgment or decree, so that the judgment will be a mere conclusion of law upon the facts found, the entering up of the proper judgment is regarded as only a ministerial act, to enforce which mandamus is the appropriate remedy.[2] So when the verdict of a jury has been rendered in a cause, in due form, and it is responsive to the issues presented and is supported by evidence, mandamus may be allowed to compel the court to enter judgment upon the verdict, the duty of entering judgment in such case being regarded as an absolute duty on the part of the court, unaccompanied with any element of judicial discretion.[3] And where an inferior court is by law deprived of the power of setting aside verdicts and granting new trials, and it is the plain duty of such court to enter judgment upon a verdict rendered, as to which it has no discretionary powers, if it has, nevertheless, set aside a verdict and granted a new trial, mandamus will lie to compel the court to give judgment upon the verdict.[4] Again, where a judgment, under the rules of the court and the laws of the state, can not be enforced until attested by the signature of the judge, and is not a final judgment on which error will lie until witnessed by such signature, mandamus will lie to compel the signing of the judgment, it being regarded, not as a judicial, but merely a ministerial act. And the writ may issue, in such a * 182 case, to the successor of the judge before whom the judgment was obtained, since the court remains unchanged, notwithstanding the change of incumbents.[5] So when, after

[1] See Williams v. Saunders, 5 Cold. 60; Smith v. Moore, 88 Conn. 105; Brooke v. Ewers, Stra. 118; State v. Judge of Fourth District Court, 28 La. An. 451.

[2] Williams v. Saunders, 5 Cold. 60.

[3] Lloyd v. Brinck, 35 Tex. 1.

[4] Cortleyou v. Ten Eyck, 2 Zab. 45.

[5] Life & Fire Insurance Co. v. Wilson's Heirs, 8 Pet. 291.

verdict, the parties to a cause have agreed upon a statement of the facts, and there remains only the mechanical act on the part of the judge of certifying the case as stipulated, in order to complete the record, he may be required by mandamus to perform this act.[1]

§ 236. Upon similar principles the writ has been allowed to compel a court to enter up judgment upon the report of a referee.[2] But it will not be granted for this purpose when the court must still exercise its discretion in granting or withholding the relief prayed.[3] And it is a sufficient return to the alternative writ directing the entry of judgment, that the cause has been removed by appeal beyond the jurisdiction of the court to which the writ is directed, since the appeal deprives such court of all power to act in the cause.[4]

§ 237. Where a county court is entrusted by statute with the power of determining upon the necessity of building bridges in the county, its functions in this respect are purely ministerial and it may be compelled by mandamus to build a bridge.[5] So where it is the duty of the court, upon proper application, to appoint certain surveyors of highways, such appointment may be enforced by mandamus.[6] And where the judge of an inferior court is required by statute to appoint commissioners to condemn lands for railway purposes, the writ will lie to compel such judge to make the appointment, the duty being regarded as merely ministerial.[7]

§ 238. While there are cases where the writ has been granted to compel the clerk of a court, regarding him as a ministerial officer, to issue an execution,[8] yet the writ will not lie for this purpose when it is not shown that an application

[1] State v. Cox, 26 Minn. 214.

[2] Russell v. Elliott, 2 Cal. 245.

[3] Ludlum v. The Fourth District Court, 9 Cal. 7.

[4] Commissioners of La Grange Co. v. Cutler, 7 Ind. 6.

[5] Commonwealth v. Justices of Fairfax Co. 2 Va. Cas. 9; Commonwealth v. Justices of Kanawha Co. Ib. 499.

[6] State v. Judges of Salem Pleas, 4 Halst. 246.

[7] Chicago, B. & Q. R. Co. v. Wilson, 17 Ill. 128. And see Illinois Central R. Co. v. Rucker, 14 Ill. 353.

[8] See Chapter II, Subdivision V.

had first been made to the court in which the judgment or decree was obtained, and that it had been rejected by that court.[1] Nor will mandamus go to the clerk of a * 183 court to compel the issuing of an execution upon a judgment rendered against a county, since a county, being a municipal corporation, created by law for public and political purposes, is a part of the government of the state and partakes of the sovereignty of the state, and is not, therefore, subject to execution.[2] So if the judgment is so ambiguous and uncertain as to be open to different constructions, rendering the right to the execution doubtful, it will not be required by mandamus.[3] Nor will the writ go to the clerk of a court, directing the performance of duties of a quasi-judicial nature, such as the approval of official bonds of county officers, the duty being one which requires the exercise of judgment and discretion, and not a mere ministerial act.[4] So if a plain and adequate remedy exists by action at law against the clerk, upon his official bond, mandamus will not lie.[5]

[1] Compton *v.* Airial, 9 La. An. 496.

[2] Gooch *v.* Gregory, 65 N. C. 142. And see Lutterloh *v.* Commissioners of Cumberland Co. 65 N. C. 403. The appropriate remedy, in such case, is held to be by mandamus against the county authorities to levy a tax in payment of the judgment.

[3] Hall *v.* Stewart, 23 Kan. 396.

[4] Swan *v.* Gray, 44 Miss. 393. Otherwise, however, where the clerk is vested with no discretion as to the approval of the bond, and his duty is imperative. Gulick *v.* New, 14 Ind. 93; People *v.* Fletcher, 2 Scam. 482.

[5] Goodwin *v.* Glazier, 10 Cal. 333.

VI. Justices of the Peace.

§ 239. Mandamus granted to set justices in motion.
240. Granted for ministerial duties.
241. And to compel entering of judgment.
242. And issuing execution.
243. When granted to allow appeal.
243 *a*. Not granted for correction of errors.
244. Report of referees.
245. Granted to perfect record; and to deliver copy.

§ 239. The principles upon which the courts interfere by mandamus with justices of the peace, are not essentially different from those regulating the interference with courts of record, which have been considered in the previous subdivisions of this chapter. We have there seen that * 184 the writ will lie to set courts in motion, where they have refused to act, and to compel them to exercise their rightful jurisdiction. The same rule applies to justices of the peace, and they may be compelled by mandamus to hear and determine matters properly within their jurisdiction and properly brought before them.[1] Thus, the writ will issue to justices of the peace to compel them to enforce a particular statute, whose enforcement is made their duty by law.[2] But it is to be observed, while the writ is freely granted to compel justices to perform their duties, that it will not lie where it is apparent that the performance of the act required would render the justices liable to an action.[3]

§ 240. As regards the performance of duties of a ministerial nature, incumbent upon justices of the peace, no reason is perceived why they should be placed upon any other footing

[1] Rex *v.* Tod, Stra. 530; King *v.* Mountague, 1 Barn. K. B. 72.

[2] King *v.* Mountague, 1 Barn. K. B. 72.

[3] King *v.* Dayrell, 1 Barn. & Cress. 485; King *v.* Greame, 2 Ad. & E. 615. And see King *v.* Mirehouse, 2 Ad. & E. 632.

than those of ministerial officers in general. And where it is made by statute the duty of certain magistrates to administer an oath of insolvency to a debtor seeking his discharge under the insolvent laws of the state, no discretion being reserved to the justices, and their duty being purely ministerial, mandamus will lie to compel them to administer the oath. Nor will the relief be withheld in such case, even though the magistrates show by their return that they were of opinion that the debtor had concealed certain property which it was his duty to disclose.[1] And the writ will go to require a justice to hold his office in the precinct for which he is elected, it being his duty so to do.[2]

§ 241. While, as to the hearing and determining of judicial matters properly presented to them and within their jurisdiction, justices of the peace are regarded strictly as judicial officers, yet as to the entering of judgments their duties and functions are considered as merely ministerial, corresponding in this respect with the duty of the clerk of a court of record in entering the judgment of the court. Hence the act of entering the judgment, not being a judicial act, may be enforced by mandamus, and the return of the * 185 justice to the alternative writ, that he has made a true record of the judgment, is not conclusive or final.[3] So, where a justice has exceeded his jurisdiction and powers by setting aside a verdict and granting a new trial, the writ will be granted to compel him to enter judgment in the cause in conformity with the verdict rendered.[4] And the writ lies to compel a justice to enter a judgment of discontinuance in a cause, which he has refused on the ground of non-payment of fees, where he is not legally entitled to the fees.[5] But it does not lie to compel a justice to alter the entry of a

[1] Harrison v. Emmerson, 2 Leigh, 764.

[2] State v. Shropshire, 4 Neb. 411.

[3] Smith v. Moore, 38 Conn. 105.

[4] Forman v. Murphy, Pen. 1024.

[5] Anderson v. Pennie, 32 Cal. 265.

record upon his docket,[1] or to enter judgment upon a verdict which is null and void.[2]

§ 242. The right of the plaintiff to an execution upon his judgment before a justice of the peace, is such a right as may be enforced by mandamus in a proper case.[3] Thus, where after judgment rendered the justice has made a conditional order, allowing the defendant to come in and defend upon payment of costs, and defendant has failed to comply with the condition, plaintiff's right to an execution becomes absolute and may be enforced by mandamus to the justice.[4] And where a defendant has appealed from a judgment, in a case in which no appeal properly lies, the entire proceedings under the appeal are *coram non judice*, and mandamus may be granted to require the justice to issue an execution.[5] But the writ will not go to compel the issuing of an execution when the question involved can be determined in an appeal then pending from the judgment, the relief being denied in such case because of the adequacy of the remedy by appeal.[6]

§ 243. The right of appeal from a justice's or magistrate's court may, in a proper case, be enforced by mandamus. And where a party convicted in a magistrate's court is entitled absolutely to an appeal from such decision to a higher court, but this right is denied and the appeal refused, he may procure redress by mandamus.[7] And when an appeal has been properly taken, mandamus will go to compel the justice to certify the appeal in due form to the higher court.[8] So when it is the plain duty of a justice to approve an appeal bond, which is tendered on an appeal from his judgment, he may be required by mandamus to approve such bond.[9] But in conformity with the well-established rule that mandamus

[1] Garnett *v.* Stacy, 17 Mo. 601.

[2] Moore *v.* The State, 72 Ind. 358.

[3] Laird *v.* Abrahams, 3 Green, 22; Terhune *v.* Barcalow, 6 Halst. 38.

[4] Terhune *v.* Barcalow, 6 Halst. 38.

[5] Laird *v.* Abrahams, 3 Green, 22. See also Kirk *v.* Cole, 3 McArthur, 71.

[6] People *v.* Huntoon, 71 Ill. 536.

[7] *Ex parte* Morris, 11 Grat. 292.

[8] Town of Orange *v.* Bill, 29 Vt. 442.

[9] Cox *v.* Rich, 24 Kan. 20.

does not lie where another specific and adequate remedy exists, it will not be granted to compel a justice to allow an appeal, where another and sufficient remedy is provided by statute to enforce the right of appeal.[1]

§ 243 *a*. The general rule denying relief by mandamus to correct the errors of inferior courts in matters properly within their jurisdiction applies with equal force to proceedings before a justice of the peace, and the writ will not go to correct the erroneous action of a justice in a matter which has been judicially determined by him.[2] And when jurisdiction over the matter in question is vested in a board of magistrates, and they have acted in the premises and reached a decision, their action can not be corrected by mandamus.[3]

§ 244. Where a justice of the peace, acting within the scope of his authority, has rejected a report of * 186 referees, though he may have decided upon insufficient reasons, his judgment is to be considered as a subsisting judgment until reversed by due process of law, and mandamus will not lie to compel him to accept the report, there having been no such refusal or delay in giving judgment as would warrant the writ.[4]

§ 245. Mandamus has been held to be the appropriate remedy to compel a justice of the peace to perfect his record. So it has been granted to compel such officer to deliver a copy of a recognizance to a person entitled thereto.[5]

[1] State *v.* McAuliffe, 48 Mo. 112.
[2] State *v.* Miller, 1 Lea, 596.
[3] Queen *v.* Justices of Middlesex, 2 Q. B. D. 516.
[4] Petition of Farwell, 2 N. H. 122.
[5] Ballou *v.* Smith, 29 N. H. 530.

VII. Illustrations of the Jurisdiction.

§ 246. Mandamus to compel the granting of appeals.
247. Not granted to compel dismissal of appeal.
248. Appeal from order of sale of partnership effects.
249. Mandamus to receive verdicts and enter judgments.
250. Lies to compel court to proceed with trial of cause.
251. The general rule and illustrations thereof.
252. Want of jurisdiction in subordinate court.
253. Rule as to courts of only appellate jurisdiction.
254. Mandamus not granted where other remedy exists.
255. Granted to procure compliance with order of superior court.
256. Granted to compel hearing of motion.
257. General conclusion; decision not interfered with.
258. Use of the writ as between federal courts.
259. When refused to officer of subordinate court.
260. Effect of other litigation; granting of administration; probate of will.
261. Correction of errors in decree.
262. Election for removal of county seat.
263. Insufficient security upon appeal.
264. Mandamus to compel holding court at proper time and place.
265. Granted to compel examination in bankruptcy.
266. When granted in aid of *habeas corpus*.
267. Damages for property taken in construction of highway.
268. Not granted where authority of special court has expired.
269. Laches of party aggrieved a bar to relief.
270. Consent of parties not sufficient foundation for writ.
271. Dismissal of cause in pursuance of military order.
272. Dismissal for want of security for costs; answer to interrogatories; substitution of attorney.
273. Parties in interest should be notified.
274. Degree of interest required.
275. To whom the writ should be addressed.

§ 246. The power of courts of original jurisdic-
* 187 tion over the granting or refusing of appeals has given rise to frequent applications for the extrordinary aid of appellate courts by mandamus. And it may be laid down as a general rule, that in cases where a party to a litigation in an inferior court is entitled to an appeal from

an order or judgment of that court, his right to such appeal may be enforced by mandamus.[1] And where the right of appeal is given, not only from final judgments, but from all interlocutory judgments which may cause irreparable injury, the writ will issue to compel a subordinate court to grant an appeal from an order dissolving an injunction, the court having refused to allow the appeal on the ground of insufficiency of the security offered.[2] So the writ will go to compel a court to entertain an application for the approval of an appeal bond, and, if the bond shall be found sufficient, to grant a supersedeas in the cause.[3] But to warrant the interference in this class of cases it must appear that the person seeking the relief is clearly entitled to an appeal, and when this does not appear the writ will be refused.[4] And mandamus will not lie to compel a court to settle a statement for the purposes of an appeal from a judgment which is only interlocutory and from which no appeal lies.[5]

§ 247. While the writ, as we have thus seen, is sometimes granted to compel the allowance of an ap- * 188 peal, it will not lie to compel subordinate courts to reinstate appeals which they have dismissed. Such dismissal, whether made in accordance with a rule of practice of the inferior court not unlawful in itself, or done in the exercise

[1] See State *v.* Judge of Sixth District Court, 22 La. An. 119; Same *v.* Same, 22 La. An. 120; State *v.* Judge of Fourth District Court, 22 La. An. 90; State *v.* Judge of Fifth District Court, 23 La. An. 713; State *v.* Judge of Second District Court, 24 La. An. 596; State *v.* Judge of Eighth District Court, 24 La. An. 599; *Ex parte* Martin, 5 Ark. 371; Beebe *v.* Lockert, 6 Ark. 422; *Ex parte* Jordan, 94 U. S. 248; *Ex parte* Railroad Company, 95 U. S. 221; Greathouse *v.* Jameson, 3 Col. 397; McCreary *v.* Rogers, 35 Ark. 298; State *v.* Parish Judge, 26 La. An. 122; Malain *v.* Judge of Third District, 29 La. An. 793; State *v.* Judge of Third District Court, 31 La. An. 800; Ware *v.* McDonald, 62 Ala. 81; State *v.* Lazarus, 34 La. An. 1117; State *v.* Mayor of Baton Rouge, 34 La. An. 1197. But see, *contra*, State *v.* Judge of Superior District Court, 27 La. An. 672; Brown *v.* Parish Judge, 29 La. An. 809.

[2] State *v.* Judge of Fourth District Court, 21 La. An. 736.

[3] State *v.* Lewis, 71 Mo. 170.

[4] *Ex parte* Cutting, 94 U. S. 14.

[5] Lake *v.* King, 16 Nev. 215.

of a judicial discretion, is held equally beyond control by mandamus, and the party aggrieved will be left to his writ of error.[1] And it is a sufficient objection to interposing by mandamus in such a case, that the court in dismissing the appeal has acted according to the dictates of its own judgment, since, while the writ is freely granted to compel courts to act, it will not lie to compel the performance of any particular act, nor to control in any degree the exercise of judicial discretion.[2] Nor will a subordinate court be compelled by the writ to dismiss an appeal on the ground that it has been improperly entertained, since if such court irregularly sustains an appeal and proceeds to hear and determine the matter in controversy, redress may be obtained by certiorari.[3]

§ 248. Where an inferior court, pending litigation for the dissolution of a partnership, has a right to order a sale of the partnership effects, and has accordingly granted an order of sale, and has refused an appeal from such order, it will not be required by mandamus to allow the appeal.[4]

§ 249. The writ will go to compel a court to receive the verdict of a jury. Thus, where the jury found for defendants, but also found as a part of their verdict that defendants should pay the costs of suit, which was plainly beyond their power, so much of the verdict as related to costs was treated as surplusage, and the writ was granted to compel the court to receive the verdict.[5] And when a verdict is found by a jury in due form and it is the duty of the court to receive and enter it, mandamus will lie.[6] So it has been awarded to require an inferior court to proceed to judgment

[1] Sinnickson v. Corwine, 2 Dutch. 311; Wells v. Stackhouse, 2 Har. (N. J.) 355; Commonwealth v. Judges of the Common Pleas, 3 Binn. 273. But see, *contra*, Freas v. Jones, 1 Har. (N. J.) 358; Adams v. Mathis, 3 Har. (N. J.) 310; Ten Eyck v. Farlee, 1 Har. (N. J.) 348. See, *contra*, Detroit & B. P. R. Co. v. Wayne Circuit Judge, 27 Mich. 304.

[2] Commonwealth v. Judges of the Common Pleas, 3 Binn. 273.

[3] Jones v. Allen, 1 Green, 97.

[4] State v. Judge of Third District Court, 6 La. An. 484.

[5] State v. Knight, 46 Mo. 83.

[6] Munkers v. Watson, 9 Kan. 668.

upon a verdict.[1] And where a verdict is found for * 189 plaintiff, but judgment is arrested because of insufficiency of the pleadings, the court may be required by mandamus to enter up judgment against the plaintiff, for the purpose of enabling him to bring a writ of error.[2] Where, however, the verdict has been set aside and the parties have proceeded to a new trial upon the merits, and plaintiff is then non-suited, it is too late for him to seek relief by mandamus to compel the court to proceed to judgment upon the former verdict in his favor. In such case, having submitted to a new trial, he is regarded as having waived all right to the interposition of the higher court.[3] And in no event should the writ be granted peremptorily, to compel the court to enter judgment upon a verdict, without notice to the defendants against whom the judgment is sought, since their rights are directly affected by the proceedings, and they should, therefore, be allowed an opportunity of being heard.[4]

§ 250. Mandamus lies to compel inferior courts to proceed with the trial of causes which they have delayed without sufficient reason, the plaintiff in a cause having an absolute right to a determination of his action.[5] And the writ has been issued to compel a subordinate court to reinstate a case on its trial docket and to proceed with the trial.[6] And where by the charter of a railway company it is provided that the owner of any land taken by the company, who may feel aggrieved with the assessment of damages, shall be entitled to an appeal to the court of common pleas of the county, which shall review the proceedings and determine the amount of the damages in a summary way, such court may be required by mandamus to proceed and determine the

[1] Brooke v. Ewers, Stra. 113; Lloyd v. Brinck, 35 Tex. 1.

[2] Fish v. Weatherwax, 2 Johns. Cas. 215.

[3] Weavel v. Lasher, 1 Johns. Cas. 241.

[4] State v. Mills, 27 Wis. 403.

[5] People v. De La Guerra, 43 Cal. 225.

[6] Sanders v. Nelson Circuit Court, Hardin, 2nd edition, 19.

appeal, when it has delayed action without adequate cause.[1]

But, while it is conceded that the writ is the appro-
* 190 priate remedy to command an inferior court to proceed with the trial of a cause, a proper case being shown, it will not issue without an affidavit, since it is not to be presumed that the inferior court has delayed justice.[2] Where, however, the affidavit shows that the court having jurisdiction of the matter refuses to act, no sufficient reason being shown for such refusal, mandamus will lie, as to compel the probate of a will.[3]

§ 251. Indeed, the rule may now be regarded as well established, that mandamus lies in all cases to compel an inferior court to proceed to the trial of a cause, and to set it in motion, when it has unreasonably delayed the proceedings, or when its refusal to proceed amounts to a denial of justice.[4] The object of the writ in this class of cases is not to compel a particular decision, but merely to set the court in motion, and to require it to exercise its undoubted jurisdiction, and when this is done its full purpose is accomplished.[5] In illustration of the rule, it is held, where a court has refused to proceed on the ground that other parties, who are unknown, may be interested in the subject-matter and should be made parties to the suit, that mandamus will lie, on the ground that the refusal of the court to proceed amounts to a delay of justice.[6] So the writ has been granted to compel a court to proceed with a cause, when it has improperly granted an order staying all proceedings and such order is not appealable.[7] So, too, where the court has allowed a continuance

[1] Budd *v.* New Jersey R. R. & Trans. Co. 2 Green, 467.

[2] Curser *v.* Smith, 1 Barn. K. B. 9.

[3] Justice *v.* Jones, 1 Barn. K. B. 280.

[4] State *v.* Judge of Commercial Court, 4 Rob. La. 227; *In re* Turner, 5 Ohio, 542; Rhodes *v.* Craig, 21 Cal. 419; Dixon *v.* Field, 10 Ark. 243. See also People *v.* De La Guerra, 43 Cal. 225.

[5] *In re* Turner, 5 Ohio, 542.

[6] State *v.* Judge of Commercial Court, 4 Rob. La. 227.

[7] Rhodes *v.* Craig, 21 Cal. 419; Avery *v.* Superior Court, 57 Cal. 247; Dunphy *v.* Belden, 57 Cal. 427.

without due cause, it has been held a proper case for a mandamus to compel it to proceed.[1]

§ 252. Notwithstanding the writ is freely granted to compel subordinate courts to proceed with the trial of causes, yet the superior tribunal will withhold its interference when the court below has refused to proceed on the ground of a want of jurisdiction, and it is not alleged that it has refused to take any action whatever. Since such court, * 191 though it may have refused to proceed to trial for want of jurisdiction, might not refuse to dismiss the cause for the same reason, and if dismissed the relator would have his legal remedy by appeal from the order of dismissal.[2]

§ 253. Where the court of last resort of a state is vested with only appellate jurisdiction, it can not issue the writ to compel an inferior court to proceed with a cause pending therein, since this would be the exercise, not of an appellate, but of an original jurisdiction, and the granting of the writ in such cases is not necessary to aid in the discharge of the functions of the court as a purely appellate court.[3] Nor will a court of purely appellate powers, authorized to issue only such writs as are necessary and incident to the exercise of its appellate jurisdiction, grant a mandamus to compel any official action on the part of officers of a subordinate court, since in all such cases the application should be made to the inferior court itself.[4] It may, however, in aid of its appellate jurisdiction, and as a necessary incident to its exercise, issue a mandamus commanding the inferior court to sign and seal a bill of exceptions, in order that the record of the cause, of which the appellate court has jurisdiction by appeal, may be completed, the purpose of the writ in such a case being merely to perfect the right of the party appealing.[5]

[1] Dixon v. Feild, 10 Ark. 243.

[2] State v. Smith, 19 Wis. 531.

[3] King v. Hampton, 3 Hayw. (Tenn.) 59; State v. Biddle, 36 Ind. 138. And see Cowell v. Buckelew, 14 Cal. 640.

[4] Cowell v. Buckelew, 14 Cal. 640.

[5] State v. Hall, 3 Cold. 255. And see State v. Elmore, 6 Cold. 528; Newman v. Justices of Scott Co. 1 Heiskell, 787.

§ 254. In conformity with the general principle that mandamus does not lie where other adequate remedy exists at law in the ordinary course of proceedings, the writ will not be granted to compel the judge of an inferior court to pay over moneys received by him in his official capacity to the parties entitled thereto, the remedy by action against the judge or against the sureties upon his official bond being deemed adequate.[1] And where an inferior court is entrusted by law with the duty of levying certain taxes for * 192 school purposes, and it has passed upon the matter and levied the tax, its decision can not be corrected by mandamus because of insufficiency in the amount levied, the proper remedy being by appeal.[2]

§ 255. An inferior court or judge refusing to proceed according to the mandate of a superior court, may be required by mandamus to proceed, although in such case a peremptory writ will not issue in the first instance upon *ex parte* statements, but only a rule to show cause. In such case it affords no justification to the inferior court that it acted upon the impression that the judgment of the higher tribunal was erroneous.[3] And the fact that the judge of the court below had been of counsel to one of the parties to the controversy, does not, of itself, disqualify him from executing the mandate of the appellate court, and constitutes no objection to the granting of a mandamus.[4] And the writ will lie from an appellate to a subordinate court to compel the latter to make an order for costs in conformity with a decision of the appellate tribunal previously rendered.[5]

§ 256. The peremptory writ of mandamus will issue to compel an inferior court to hear and determine a motion presented by the relator, where the return of such court to the alternative writ admits the filing of the motion as alleged,

[1] State *v.* Meiley, 22 Ohio St. 534.

[2] County Court *v.* Robinson, 27 Ark. 116.

[3] State *v.* Collins, 5 Wis. 339; Johnson *v.* Glascock, 2 Ala. 519.

[4] State *v.* Collins, 5 Wis. 339.

[5] Jared *v.* Hill, 1 Blackf. 155.

and affords no excuse or reason for the refusal to hear and determine the matter.[1]

§ 257. The obvious conclusion to be drawn from all the cases in which the extraordinary aid of a mandamus has been extended, to compel subordinate courts to act upon matters within their jurisdiction and properly presented for adjudication, is that the relief will be granted only where the courts have refused to act, and then merely for the purpose of setting them in motion, and not to control or in any manner dictate what their action shall be. It is, therefore, a sufficient objection to the interference in such cases, and constitutes a sufficient return to the alternative writ, that the * 193 court has already acted upon and decided the particular matter in controversy. And upon such return the superior court will not investigate the propriety or correctness of the decision of the court below, nor inquire whether its action was erroneous.[2] And, in general, it may be said that whatever views the higher court may entertain as to the propriety of the action of the court below upon judicial matters properly presented to that tribunal, it will not interfere to compel the performance of an act which such court, acting in a judicial capacity, has refused. Thus, where the lower court has refused to issue a warrant for the arrest of a person charged with the commission of a crime, upon the ground that the evidence presented was insufficient to authorize the arrest, mandamus will not lie to correct such decision, or to compel the issuing of the warrant.[3]

§ 258. The writ will lie from the Supreme Court of the

[1] Austen v. Probate & Common Pleas Court, 35 Mo. 198.

[2] Queen v. Old Hall, 10 Ad. & E. 248.

[3] United States v. Lawrence, 3 Dall. 42. But see, *contra*, Barnett v. Warren Circuit Court, Hardin, 2nd edition, 180, where an inferior court was compelled by mandamus to quash a bond for costs, given in a cause instituted therein, on the ground of its insufficiency, the relief being granted on the ground that the court, by its refusal to quash the bond, had deprived the relator of a right for which the law furnished him no other remedy than mandamus.

United States to a district court, to compel it to reinstate a case which it has dismissed on the ground that the pleadings contained no allegations of the value of the matter in dispute, and that it did not therefore appear that the cause was within the jurisdiction of the court, where the action is not for the recovery of a money demand, but for the recovery of lands. In such case it is not necessary that the value of the thing demanded should be stated in the pleadings, but it may be properly proven in evidence, and the district court may be compelled in such a case to reinstate the cause and to hear and determine it, to the end that the party aggrieved may have the final judgment of the Supreme Court, if the value of the land in controversy should be sufficient to entitle him to a hearing in that court.[1] But since the * 194 power of circuit courts of the United States to issue the writ, extends only to cases where it is necessary in aid of their jurisdiction, they will not interfere to compel a district court to vacate a rule allowing certain amendments to the record in a cause there pending, such a use of the writ not being in aid of the jurisdiction of the circuit court.[2]

§ 259. A state court of final resort will not interfere by mandamus to compel a subordinate court to direct one of its own officers to execute a decree, the enforcement of which that court has enjoined. In such case, the officer being enjoined by his own court from enforcing the decree, can not be compelled by the higher tribunal to violate the injunction. And an additional reason for refusing the relief is found in the principle heretofore considered, that a writ of mandamus confers no authority, and only issues to compel a party to perform an act which is his plain duty without the writ.[3] Nor will the writ go to direct a court to proceed with the trial of a cause which has been enjoined.[4]

§ 260. The existence of other litigation in another forum,

[1] *Ex parte* Bradstreet, 7 Pet. 634. See S. C. 8 Pet. 588.

[2] Smith *v.* Jackson, 1 Paine, 453.

[3] People *v.* Gilmer, 5 Gilm. 242.

[4] People *v.* Muskegon Circuit Judge, 40 Mich. 63.

affecting the matter which is the foundation of the proceedings in mandamus, may sometimes operate as a bar to relief by this extraordinary writ. And it has been refused when sought to compel the granting of administration, it being shown that a contest was already pending as to a pretended will of the deceased.[1] But subsequent litigation will not be allowed to affect proceedings for mandamus already instituted, and where the writ has been issued to compel the probate of a will, it will not be superseded by the fact that litigation concerning the will was instituted after the issuing of the writ.[2]

§ 261. Mandamus will not go to compel the judge of a subordinate court to strike from a decree certain words which he has inserted therein, after the decree was signed, where the effect of the words inserted is not such as to injure the parties in any way, the court having acted in good faith and merely for the purpose of correcting a sup- * 195 posed clerical error, since in such case the relator shows no specific legal right which will be injured by the act which he seeks to correct.[3]

§ 262. Where a statute providing for the location of a county seat, makes it the duty of the county judge to canvass the returns of the election upon the question of location, the power of determining whether the election has been held and the returns have been properly made in the different precincts, and of determining the sufficiency of the returns and their genuineness, is regarded as of a judicial nature, and therefore mandamus will not go to compel such judge to receive returns which he has already passed upon and rejected.[4]

§ 263. When a court has accepted insufficient security upon an appeal from its decree, mandamus has been granted to compel it to proceed with the execution of the decree, not-

[1] Steward v. Eddy, 7 Mod. Rep. 143.

[2] King v. Bettesworth, 7 Mod. Rep. 219.

[3] State v. Larrabee, 3 Chand. 179.

[4] Arberry v. Beavers, 6 Tex. 457.

withstanding the appeal and the order of the court that the appeal bond should operate as a *supersedeas.*[1] And where a statute gives an appellant from a judgment of a justice's court the right to substitute a new appeal bond in lieu of the original bond returned by the justice, but the court in which the appeal is pending refuses to allow the substitution of the new bond, it may be compelled so to do by mandamus.[2]

§ 264. Mandamus would seem to be the appropriate remedy to compel the holding of a term of court at the time prescribed by law, when great injury is likely to result from the refusal of the court to hold the term, and in such case the party aggrieved has no other adequate and specific remedy.[3] And the writ will go to compel the holding of a court at the place designated by law for that purpose.[4]

§ 265. Commissioners in bankruptcy, whose duties partake of a judicial nature, may be required by mandamus to issue their warrant for the further examination of a bankrupt who has been committed for not satisfactorily answer-
* 196 ing at a previous examination, but who is afterwards desirous of having a further examination for the purpose of making full disclosure of his affairs.[5]

§ 266. Where, under the laws of a state, a prisoner in custody before indictment found, has a right to be heard upon *habeas corpus* touching the question of his guilt, but the court refuses to hear the evidence offered, it may be compelled by mandamus to hear and consider the evidence. But in such case the writ in no manner interferes with the exercise of the discretion or judgment of the court to which it is addressed, and the power of the superior court is exhausted when it requires the court below to hear and consider the evidence, without compelling it to render any particular de-

[1] Stafford *v.* Union Bank of Louisiana, 17 How. 275.

[2] Garrabrant *v.* McCloud, 3 Green, 462.

[3] *Ex parte* Trapnall, 6 Ark. 9.

[4] County of Calaveras *v.* Brockway, 30 Cal. 325.

[5] *In re* Bromley, 3 Dow. & Ry. 310

cision.[1] And the writ will not go to direct an inferior court to make an order upon a sheriff to produce a prisoner before the court in response to a writ of *habeas corpus*, the making of such order being a judicial act and not subject to control by mandamus.[2]

§ 267. Where a court has ordered the appropriation of private property for public purposes, as the land of a private citizen in opening a public highway, and the damages for the property taken have been properly assessed by a jury, the court may be required by mandamus to order the amount of damages so assessed to be paid in accordance with law, there being no other specific legal remedy.[3]

§ 268. In conformity with the general principle denying relief by mandamus where the writ, if granted, would prove inoperative, it will be refused when sought against a court acting under a special commission which has expired.[4]

§ 269. Laches of the party aggrieved in seeking to avail himself of the remedy by mandamus may operate as a bar to relief. Thus, when a party had permitted a period of five years to elapse after the final determination of a cause, before seeking relief by mandamus, it was deemed inexpedient to interpose.[5] And it has been held that even a year's acquiescence in the proceedings complained of was sufficient to prevent relief by mandamus.[6]

§ 270. It would seem that even the consent or express stipulation of the parties to a cause that cer- * 197 tain steps may be taken therein, will not lay the foundation for interference by mandamus in a case not properly falling within the rules governing the jurisdiction. For example, the writ will not issue to compel a court to dismiss a cause properly pending therein, in pursuance of a written

[1] *Ex parte* Mahone, 30 Ala. 49.

[2] *Ex parte* Shaudies, 66 Ala. 134.

[3] Forsyth *v.* The Justices, Dud. (Geo.) 87.

[4] People *v.* Monroe Oyer and Terminer, 20 Wend. 108.

[5] People *v.* Delaware Common Pleas, 2 Wend. 255.

[6] People *v.* Seneca Common Pleas, 2 Wend. 264.

stipulation between the parties for its dismissal.[1] So the writ has been refused where it was sought to compel a court to strike a cause from its docket, on the ground that it had been submitted to arbitration, and that such submission operated as a continuance.[2]

§ 271. Where an inferior court has dismissed a cause in pursuance of a peremptory military order requiring its immediate dismissal, mandamus will not lie to compel the court to set aside its order of dismissal.[3]

§ 272. In Alabama the denial by a court of a right conferred by statute has been held sufficient to warrant relief by mandamus. And where, under the statutes of the state, a defendant against whom a suit is instituted has an absolute right to the dismissal of the cause if security for costs is not given, a denial of this right and a refusal to dismiss the action, no final judgment having been rendered, will warrant interference by mandamus, there being no other specific remedy adequate to enforce the right.[4] But where the court has refused, on motion, to require an answer to certain interrogatories in aid of a discovery at law, it will not be compelled so to do by mandamus where the testimony sought to be elicited by the interrogatories is irrelevant.[5] The writ, however, will lie to compel a court to allow the substitution of an attorney in a cause pending, there being no other adequate and unembarrassed remedy.[6]

§ 273. It being a principle of general application that persons whose rights are to be affected by judicial proceedings, should have notice of such proceedings and an opportunity to be heard, a peremptory mandamus will
* 198 not be granted to require the performance by a court of an act affecting the rights of litigants therein, with-

[1] *Ex parte* Rowland, 26 Ala. 133.
[2] *Ex parte* Garlington, 26 Ala. 170.
[3] *Ex parte* Williams, 43 Ala. 154.
[4] *Ex parte* Cole, 28 Ala. 50; *Ex parte* Robbins, 29 Ala. 71.
[5] *Ex parte* Grantland, 29 Ala. 69. And *quære*, whether the writ would lie for such a purpose in any case.
[6] People *v.* Norton, 16 Cal. 436.

out giving them notice. And where the writ is sought to compel a court to render judgment on a verdict, the defendants against whom the judgment is sought should be notified of the application, since their rights are to be directly affected by the judgment, while the judge to whom the writ is addressed is only a nominal party.[1]

§ 274. Where the writ is sought for the purpose of compelling a subordinate court to grant a certain rule against one of its own officers, the relator, at whose instance the application is made, must show that he has some interest in the matter in question, and failing to show any interest, he will not be allowed to disturb by mandamus a state of affairs in which the parties actually in interest have themselves acquiesced.[2]

§ 275. The writ of mandamus to a subordinate or inferior court should be directed to the judge or judges of the court, where there are other judges who are authorized to participate in holding the terms of the court, since in case of disobedience to the writ, the authority to compel obedience is exercised over the judges personally who are vested with the power of exercising the functions of the court.[3] In ordinary cases, however, it would seem to be correct practice to address the writ either to the court as such, or to the individual judges composing it.[4]

[1] State *v.* Mills, 27 Wis. 403.

[2] *Ex parte* Fleming, 2 Wal. 759.

[3] Hollister *v.* Judges, 8 Ohio St. 201.

[4] St. Louis County Court *v.* Sparks, 10 Mo. 118.

CHAPTER IV.

OF MANDAMUS TO PRIVATE CORPORATIONS.

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I. Outlines of the Jurisdiction.

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288. When granted for admission to corporate office.
289. Not granted to compel corporation to allow subscription to stock.
290. When granted in case of monopoly.

§ 276. The jurisdiction by mandamus over private corporations, is of ancient origin and is well established. It is exercised, both in England and America, for the enforcement of corporate duties, and to compel the proper exercise of corporate functions, in cases where the law affords no other adequate or specific remedy. And the writ of mandamus may

now be regarded as the most efficient means by which the common-law courts control the operations of civil * 200 corporations aggregate, both to compel the observance of the ordinances of their constitution, and to enforce a just recognition of the rights of their members in the exercise of the corporate franchise.

§ 277. It may be laid down as a general rule governing the exercise of the jurisdiction in question, that where a specific duty is imposed by law upon a private corporation, and no other adequate or specific remedy is provided for its enforcement, the writ of mandamus will be granted.[1] And the effect of the writ in such cases is to compel the corporate authorities to take the necessary steps for performing the duty required in the manner provided by law, since the mandate of the court necessarily implies that the act to be performed shall be done in a legal manner. Thus, the duty of trustees of an incorporated company to make provision for holding a meeting of corporate stockholders to elect successors to the trustees, is a duty whose performance may be coerced by mandamus, and the writ in such case necessarily implies that the election shall be called in accordance with the mode provided by law.[2] So where it is made by statute the imperative duty of insurance companies, organized and doing business within a state, to submit their books and affairs to the inspection of officers appointed for that purpose by the secretary of state, and the statute requires the officers or agents of such companies to cause their books to be opened for the inspection of the persons thus appointed, mandamus will lie to enforce the performance of these duties.[3] And where, under the laws of a state, joint stock companies are required to furnish to the proper officers

[1] People v. State Insurance Co. 19 Mich. 392; State v. Board of Trustees, 4 Nev. 400; Fireman's Insurance Co. v. Mayor of Baltimore, 23 Md. 297; State v. Wright, 10 Nev. 167; Mount Moriah Cemetery Association v. Commonwealth, 81 Pa. St. 235; Price v. Riverside L. & I. Co. 56 Cal. 431; People v. Cummings, 72 N. Y. 433.

[2] State v. Board of Trustees, 4 Nev. 400.

[3] People v. State Insurance Co. 19 Mich. 392.

who has jurisdiction of the matter, the proper course being to present this fact in the return.[1]

§ 281. Mandamus is the appropriate remedy to compel a corporation or its officers to affix the corporate seal to its official action, that it may be properly attested.[2] Thus, it lies to the keepers of the common seal of a university, requiring them to affix the seal to the diploma or instrument appointing one to an office in the university, to which he has been duly elected.[3] So it lies to the provost of a college, to compel him to affix the college seal to the presentation of one claiming to have been nominated to a living in the college.[4] So, too, it will be granted to compel a college officer to affix the corporate seal to the answer of the college to a bill in chancery, contrary to his own separate and individual answer in the same cause.[5] But it will not lie to a trading corporation, to compel it to give one of its members a "proof-mark," or recommendatory mark which he claims as necessary to enable him to sell his wares.[6]

§ 282. The writ may be used for the enforcement of trusts of a religious nature, and to compel trustees of a religious association to carry out the original object of their organization. And where a congregation is organized and a church established as a branch of a particular church
* 203 or denomination, and for the purpose of inculcating that particular faith, the trustees of the association may be compelled to admit a minister who has been duly appointed by the proper authority.[7] And in such case, it constitutes no objection to the granting of the writ that the

[1] King *v.* Whaley, 7 Mod. Rep. 308.

[2] Rex *v.* Windham, Cowp. 377; Rex *v.* Vice Chancellor of Cambridge, Burr. 1647; King *v.* University of Cambridge, 1 Black. W. 547; King *v.* Bland, 7 Mod. Rep. 355; Queen *v.* Kendall, 1 Ad. & E. N. S. 366.

[3] Rex *v.* Vice Chancellor of Cambridge, Burr. 1647.

[4] King *v.* Bland, 7 Mod. Rep. 355.

[5] Rex *v.* Windham, Cowp. 377.

[6] Anon. Ld. Raym. 989.

[7] People *v.* Steele, 2 Barb. 397; Feizel *v.* Trustees of First German Society, 9 Kan. 592.

pastoral office is already filled, or that a remedy might be sought in ejectment, since mandamus is the more complete and effectual means of enforcing the observance of the original trust.[1]

§ 283. But the existence of another adequate remedy by an ordinary action at law, is a sufficient bar to the exercise of the jurisdiction by mandamus over corporate associations or organized bodies, as well as in all other cases, it being a fundamental principle, lying at the very foundation of the law of mandamus, that the writ is never granted when the law supplies another adequate and specific remedy. Therefore mandamus will not go to the trustees of a church, in behalf of a pew-holder, to compel them to restore the relator to the possession of his pew, since full and adequate relief may be had by an action at law against the persons disturbing him in his possession.[2] Nor will mandamus go to compel a corporation to make payment of an indebtedness due under a statute, when adequate redress may be had by an ordinary action.[3]

§ 284. As regards the question of demand and refusal, as necessary to lay the foundation for proceedings in mandamus, it is held that where the proceedings are instituted against corporate officers, to compel the performance of a corporate duty of a plain and unequivocal nature, and concerning which there can be no dispute, no previous demand need be shown to support the application.[4]

§ 285. The fulfillment of its obligations created by statute, such as the payment of interest out of a particular fund, may be enforced against a corporation by mandamus. Thus, where under an act of legislature it is made the duty of the officers of an incorporated company, to provide out of a certain fund for the payment of interest on * 204

[1] People *v.* Steele, 2 Barb. 397.

[2] Commonwealth *v.* Rosseter, 2 Binn. 360.

[3] Queen *v* Hull & Selby R. Co. 6 Ad. & E. N. S. 70.

[4] Mottu *v.* Primrose, 23 Md. 482. But see Price *v.* Riverside, L. & I. Co. 56 Cal. 431.

certificates of capital stock issued for its bonds, the writ may be granted to enforce the performance of this duty.[1] It will not, however, be granted to compel a private corporation to pay a judgment recovered against it, and to make calls upon its stockholders for this purpose, but the judgment creditor will be left to his ordinary remedy by execution. Nor will the fact that an execution against the corporation may prove fruitless lay the foundation for relief by mandamus, but the party aggrieved will still be left to pursue the ordinary remedy.[2]

§ 286. Since the granting of the writ is largely a matter of sound judicial discretion, it will not be allowed to compel the holding of an election for a churchwarden because of irregularities in the former election, when it does not appear that any injustice has been caused by the irregularities complained of, or that any elector was prevented from voting, and when the affidavits in support of the application fail to disclose that any one has been prejudiced.[3]

§ 287. Mandamus has been recognized as the appropriate remedy to compel the admission of a person duly qualified as a member of an incorporated society, such as a medical association, no other remedy being equally efficacious to enable the applicant to participate in the benefits of the corporate franchise. And when the applicant is in all other respects well qualified for admission, the fact that at some previous time he may have failed in the observance of the code of professional ethics established by the society, of which he was not then a member, affords no bar to his admission by mandamus.[4] But it will not lie to compel such admission to a corporate franchise, when it is plainly apparent that the applicant, if admitted, will be immediately expelled, such a

[1] State *v.* Trustees of Wabash & Erie Canal, 4 Ind. 495.

[2] Queen *v.* Victoria Park Co. 1 Ad. & E. N. S. 288.

[3] Regina *v.* Parish of Goole, 4 L. T. R. N. S. 322.

[4] People *v.* Medical Society of Erie, 32 N. Y. 187. See, as to the right to a mandamus to compel admission to a college, State *v.* White, 82 Ind. 278.

case being regarded as an eminently proper one for the exercise of judicial discretion by withholding the * 205 writ.[1]

§ 288. While the principle is well established that the courts will not, upon applications for mandamus, try the title to an office or franchise, and will not grant the writ to compel the admission of a claimant to an office which is already held under color of right by an actual incumbent, yet, in the case of an office in a private corporation, when no claim of right is set up against that of the relator, he may have the aid of a mandamus to admit him to the office.[2]

§ 289. In illustration of the general rule that the writ is never granted where other and sufficient remedy may be had in the ordinary course of proceedings at law, it will not issue to compel an incorporated company to allow the relator to subscribe for certain shares of its stock. In such a case the remedy by action is deemed ample, since if the relator should establish his right at law, he could recover sufficient damages to enable him to purchase the shares in market.[3]

§ 290. It would seem that where a company is incorporated with certain special powers and privileges, which others are not permitted to exercise, and is empowered to manufacture and sell a particular commodity, necessary for the use of the public, of which it has by its charter a practical monopoly, the corporation may be required by mandamus to furnish the commodity to persons who, under the provisions of the charter, are entitled to receive it, and who offer to comply with the requisite conditions.[4]

[1] *Ex parte* Paine, 1 Hill, 665.

[2] Curtis *v.* McCullough, 8 Nev. 202.

[3] United States *v.* Bank of Alexandria, 1 Cranch C. C. 7.

[4] People *v.* Manhattan Gas Light Co. 45 Barb. 136. But the writ was refused under the special circumstances of the case.

II. Amotion from Corporation.

§ 291. Mandamus to restore corporator, of ancient origin.
292. Regular amotion not interfered with.
293. Control of courts derived from visitatorial powers.
294. Mandamus lies to correct improper disfranchisement of corporator.
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297. When granted to restore ministers to churches.
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300. Actual amotion from franchise must be shown.
301. Writ not granted for mere irregularities in amotion.
302. Expulsion from medical society.
303. Ecclesiastical offices in England.
304. Requisites of the return to the alternative writ.
305. Suspension a ground of mandamus; distinction between removal and suspension from corporate office.

§ 291. The expulsion of members of corporate
* 206 bodies from their position as corporators, has frequently given rise to applications for the extraordinary aid of the courts by mandamus, to compel their restoration to the corporate franchise and to enforce a due recognition of their rights as members of the body corporate. The use of the writ of mandamus as a remedy for the wrongful amotion of a corporator, and to restore him to the enjoyment of the franchise of which he has been wrongfully deprived, is of very ancient origin, and may be distinctly traced to a period as early as the reign of Edward II.[1] It was also used for the same purpose in the time of Henry VI., and in the reign of Elizabeth it was treated as a well-established jurisdiction.[2]

§ 292. It is to be observed in the outset, that when one voluntarily becomes a member of an incorporated society or

[1] See Dr. Widdrington's case, 1 Lev. part I. 23; S. C. *sub nom.* Dr. Witherington's case, 1 Keb. 2.

[2] Middleton's case, Dyer, 333, a.

association, whose by-laws provide a certain method of amotion for certain specified causes, the assent of the member thereto being a fundamental condition of his tenure of membership, the right of amotion is clearly estab- * 207 lished in the corporate body, and may be duly exercised in the manner and for the purposes prescribed. And when, under such an organization, a corporator has been regularly tried and expelled in due form, the sentence of the corporate body, thus acting in a judicial capacity, is not to be questioned collaterally, nor will the merits of such expulsion be examined in proceedings for a mandamus.[1] So a member of a voluntary association or corporation, such as a board of trade, who, after due trial, has been regularly suspended or removed from membership because of misconduct or of a violation of a rule or by-law of the corporation, which is a valid regulation and within the power of the corporation, will not be restored to membership by mandamus.[2] And when a member of a voluntary corporation, who has been expelled from membership, brings an action and recovers judgment against the association for such expulsion, he will be held to have waived all right to invoke the aid of a mandamus to procure his restoration.[3]

§ 293. The right of amotion, however, which may be said to exist in all corporate bodies, is nevertheless a right which is not to be exercised entirely independent of judicial control. And the supervision which is maintained by the courts over corporations in the exercise of this right, may be re-

[1] Society *v.* The Commonwealth, 52 Pa. St. 125.

[2] People *v.* Board of Trade, 45 Ill. 112; Same *v.* Same, 80 Ill. 134; State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670.

[3] State *v.* Slavonska Lipa, 28 Ohio St. 665. And where, under a statute of the state, the writ of mandamus is "an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform or omit to do an act, the performance or omission of which is enjoined by law," it is held that the writ will not lie against a purely private corporation, such as a college of physicians and surgeons, to restore a member who has been expelled. Cook *v.* College of Physicians, 9 Bush, 541.

garded as derived from their visitatorial power of correcting the misconduct of corporations. This visitatorial power rests, in this country, in the various courts of general common-law jurisdiction and powers, within whose control the corporation exists, and these courts, acting by the writ of mandamus directly upon the corporations, may, and do, investigate their proceedings in the amotion of corporate members.[1]

§ 294. While the doctrine was formerly maintained in the court of kings bench, that mandamus would not lie to restore one to an office or franchise in a private corporation, in which the public was in no way concerned,[2] yet the later and better considered doctrine is, that no public interest need be shown to warrant the interposition of the courts. And the rule is now well established, that mandamus will lie to restore to his corporate rights a member of a corporation, who has been improperly disfranchised or irregularly removed from his connection with the corporation. And while the civil courts will not inquire into the merits of the decision of corporate authorities, in expelling or removing a corporator in the regular course of proceedings, yet if the amotion has been conducted without due authority, * 208 the courts will interfere by mandamus to compel the restoration of the member to his corporate franchise.[3]

§ 295. Want of notice to the person removed, of the proceedings of the corporation for his removal, is regarded as sufficient ground for invoking the extraordinary aid of a mandamus, and where a corporator has been removed without

[1] See State v. The Georgia Medical Society, 38 Geo. 608.

[2] Vaughan v. Company of Gun Makers, 6 Mod. Rep. 82.

[3] Commonwealth v. St. Patrick Benevolent Society, 2 Binn. 441; Commonwealth v. The German Society, 15 Pa. St. 251; People v. Mechanics Aid Society, 22 Mich. 86; People v. Medical Society of Erie, 24 Barb. 570; State v. Chamber of Commerce, 20 Wis. 63; Delacy v. Neuse River Navigation Co. 1 Hawks, 274; State v. Georgia Medical Society, 38 Geo. 608; State v. Carteret Club, 40 N. J. L. 295. See also Lamphere v. Grand Lodge, 47 Mich. 429.

notice, and without opportunity of being heard in his defense, the courts will interpose for his relief, it being the unquestioned right of every person to receive notice of any proceedings against him which may affect his rights.[1] And when no sufficient cause is shown for the removal, and the proceedings are characterized by irregularity and a spirit of malice on the part of the other corporators, and a predetermination to expel the member against whom the proceedings are instituted, a proper case is presented for the exercise of the jurisdiction.[2] So when a member has been disfranchised illegally and without due authority, for violating a rule of the corporation in conflict with public policy and the general law of the land, the writ will be granted to compel his restoration to the privileges and franchises of membership.[3] And the writ will go to restore to membership in an incorporated society one who has been expelled for the violation of a by-law which is not connected with or germane to the objects of the incorporation and not authorized by its charter.[4]

§ 296. In England, the jurisdiction by mandamus has been frequently invoked to control the action of the great universities over the franchises of their members, such as college fellowships and degrees. The authorities are somewhat conflicting as to the right to interfere in this class of cases. Thus, it has been held that the writ would lie to restore a member of a university to his degree with which certain temporal rights were connected, and from which he had been wrongfully removed, even though there was a university court having jurisdiction of the matter, if that court had exceeded its powers and removed for * 209 insufficient cause, and without giving the accused notice of the proceedings, or an opportunity to defend.[5] But, however

[1] Delacy v. Neuse River Navigation Co. 1 Hawks, 274.

[2] State v. Georgia Medical Society, 38 Geo. 608.

[3] People v. Medical Society of Erie, 24 Barb. 570.

[4] Commonwealth v. St. Patrick Benevolent Society, 2 Binn. 441.

[5] King v. University of Cambridge, 8 Mod. Rep. 148; S. C. Stra. 557, 1 Ld. Raym. 1334. And see King v. Patrick, 2 Keb. 65; King

reasonable this doctrine may appear upon its face, it seems hardly consistent with the weight of authority. And the better doctrine seems to be, that the jurisdiction is exercised with reference to the powers of the corporation itself, and where, as in the case of a university, the corporation has its own visitor, empowered with functions of a quasi-judicial nature, and whose visitatorial power extends to the right of amotion from the body corporate, the ousting of a member, subject to the jurisdiction of the visitor, affords no sufficient ground for interfering by mandamus.[1] The writ, therefore, will not lie to restore one to a fellowship in a college of one of the universities, such colleges being private foundations, subject to visitation, and governed by the particular rules and regulations of their founders. And a member accepting a fellowship and being admitted, accepts it upon condition that he shall submit to the government of the visitor of the corporation.[2]

§ 297. Upon principles similar to those upon
* 210 which the interference is granted in cases of private corporations of a secular nature, the courts will inter-

& Queen *v.* St. John's College, 4 Mod. Rep. 241.

[1] Dr. Widdrington's case, 1 Lev. part I. 23; S. C. *sub nom.* Dr. Witherington's case, 1 Keb. 2; Appleford's case, 1 Mod. Rep. 82; Parkinson's case, Carth. 92; S. C. 3 Mod. Rep. 265. And see further, upon the same subject, Dr. Patrick's case, 1 Keb. 289; S. C. Ib. 833. But see King *v.* Patrick, 2 Keb. 65; King & Queen *v.* St. John's College, 4 Mod. Rep. 241.

[2] Parkinson's case, Carth. 92. "Mandamus to restore Parkinson to a fellowship in Lincoln College, in Oxford, who was actually possessed of his freehold there, but was expelled. Resolved by all the court, that a mandamus should not be granted to restore a fellow or member of any college of scholars or physic, because those are private foundations and governed by particular laws of the founders; for which reason this court can not take notice of their particular ordinances. Besides, every fellow of a college, when he is admitted to a fellowship, he accepts it under such a condition that he shall submit to the government of the visitor of that college; and that if any injury is done to him by an inferior officer, his remedy is by way of appeal to the visitor; for this court hath no power to intermeddle; and the Lord Chief Justice HALE was always of that opinion."

fere by mandamus to restore to their churches ministers who have been improperly deposed, where there are endowments or emoluments of a temporal nature connected with the pastoral office. This being shown, and the relator having shown a good *prima facie* title, coupled with long and undisturbed possession of the church, until dispossessed by force and violence, a sufficient case is presented to warrant interference by mandamus to compel his restoration.[1] And where a minister in a regularly incorporated church has been removed improperly and without regard to the rules of the association, the writ will go to restore him to his pastoral functions. In such a case the court will investigate the proceedings connected with the removal, for the purpose of determining whether it has been conducted in a legal and proper manner.[2] But where such minister is subsequently disqualified from holding his office, by the regularly constituted authorities of the church, the disqualification is sufficient cause for quashing the writ, and discharging parties from proceedings in attachment for its violation.[3]

§ 298. The general principle already stated denying mandamus to restore to membership in a private or civil corporation, when the removal has been regularly made under due authority vested in the corporate body, applies with equal force in cases of removal from membership in a religious society. And when a member of such a society has been regularly expelled by the proper church authorities, upon grounds of misconduct of which he has been proven guilty, he will not be restored to membership by mandamus. In such case, the proper church judicatory having acted, and the relator having submitted himself to such tribunal by accepting membership in the congregation, the courts will decline to review

[1] Runkel *v.* Winemiller, 4 Har. & McHen. 429; Rex *v.* Blooer, Burr. 1043. And see Brosius *v.* Reuter, 1 Har. & J. 480; S. C. Ib. 551. But see Smith *v.* Erb, 4 Gill, 437.

[2] Weber *v.* Zimmerman, 22 Md. 156.

[3] Weber *v.* Zimmerman, 23 Md. 45.

or correct its action by the use of this extraordinary writ.[1] Nor will the writ be granted against an ecclesiastical corporation to restore a member to his standing and rights of membership before a final decision by the church authorities, since they are the best judges of what constitutes an offense against church discipline.[2] Nor will the courts interpose by mandamus in this class of cases when adequate relief may be had by an ordinary action. When, therefore, a member of an incorporated religious body, entitled to a voice in the election of its officers and to the use and enjoyment of its property for religious purposes, is wrongfully deprived of these rights by the action of the corporation, mandamus will not lie to restore him to membership and the rights incident thereto when he may find relief by an action for damages.[3]

§ 299. The office or position of a trustee in an elee-
* 211 mosynary corporation, such as a school founded by volun-
tary contributions, is regarded as a franchise of such a nature that mandamus lies to restore an incumbent who has been improperly removed. And this is so, even though no profit attaches to the office, and no pecuniary loss is incurred by being deprived of the exercise of its functions.[4] And the writ has been allowed to restore one to a clerkship in an incorporated trading company, from which he has been improperly removed.[5]

§ 300. While, as we have thus seen, the courts freely interpose by mandamus in cases of a wrongful amotion from corporate franchises, to warrant this relief it must clearly appear that the corporator is actually denied the enjoyment and exercise of his franchise, and it is not sufficient to show that he is merely restricted in the mode of its exercise. Thus, a refusal to allow a member to speak or vote at

[1] State *v.* Hebrew Congregation, 31 La. An. 205. And see People *v.* Anshei Chesed Congregation, 37 Mich. 542.

[2] German Reformed Church *v.* Seibert, 3 Pa. St. 282.

[3] People *v.* St. Stephen's Church, 53 N. Y. 103, overruling S. C. 6 Lansing, 172.

[4] Fuller *v.* Trustees, 6 Conn. 532.

[5] White's case, Ld. Raym. 1004.

successive corporate meetings, being only a restriction upon the mode of exercising his rights, and not an actual exclusion from the corporation, affords no ground for a mandamus.[1]

§ 301. Mere informality in the proceedings of a corporation for the removal of a member, especially if such informality is caused by his own action, will not justify interference by mandamus, when it is evident that there were just grounds for his amotion, and that he has been acting in hostility to the corporation, and seeks a restoration only to continue his opposition to its interests.[2] Nor will the peremptory writ be awarded, to restore one to a * 212 corporate office, however irregularly he may have been removed, when it is shown by the return to the alternative writ that there was good ground for removal, and when it is apparent that the relator, if restored to his franchise, might be again immediately removed.[3]

§ 302. When an incorporated medical society is vested by its charter and by-laws with jurisdiction to inquire into and pass judgment upon the conduct of its members, and to expel them for sufficient cause, if the proceedings in the expulsion of a member for unprofessional conduct appear to have been conducted with due deliberation, and the offending member has been allowed ample opportunity to be heard in his defense, there being no evidence of haste or prejudice in the proceedings against him, or that the corporation acted in violation of his rights, mandamus will not lie.[4]

§ 303. In England, in cases of offices of an ecclesiastical nature, over which the ecclesiastical courts have full jurisdiction, the civil courts will not interfere by mandamus. Thus, the kings bench will not grant the writ to the doctors com-

[1] Crocker v. Old South Society, 106 Mass. 489.

[2] State v. Lusitanian Portugese Society, 15 La. An. 73.

[3] King v. Griffiths, 5 Barn. & Ald. 731.

[4] Barrows v. Massachusetts Medical Society, 12 Cush. 402.

mons, to restore a proctor to his office, but will leave him to his remedy in the ecclesiastical courts.[1]

§ 304. When proceedings in mandamus are instituted to test the right of amotion from a corporate body, and the corporation is commanded by the alternative writ to restore the relator to his franchise, the return should set forth positively and without evasion or inference the particular facts relied upon in justification of the corporate action, in order that it may appear whether the relator was properly removed and for legal and sufficient cause. All facts relating to the conviction and amotion should be shown, as well those relating to the cause of removal as to the form and mode of procedure.[2] In other words, facts should be alleged in the return, and not mere conclusions from facts. * 213 It is not sufficient, therefore, that the corporation should allege that the relator was tried and expelled by a "select number" of the corporators, but it should be shown from what source this select number derived their authority, and in what manner they were appointed, that the court may determine whether the proceedings were conducted in accordance with law.[3] Nor is it a sufficient compliance with the rule, for the corporation to allege in its return that the relator was expelled "according to the terms of the constitution and by-laws," which are referred to and made by reference a part of the return. Such a return is plainly insufficient, since the facts necessary to show the course of procedure are only inferable from the return, and a corporation will not be allowed to shield itself behind a return which seeks to constitute the corporate body itself the sole judge of the regularity of its proceedings.[4]

§ 305. Suspension from a corporate franchise, as well as

[1] Lee's case, Carth. 169.

[2] Green v. African Methodist Society, 1 S. & R. 254; Society v. The Commonwealth, 52 Pa. St. 125. And see Commonwealth v. Guardians of the Poor, 6 S. & R. 469; Commonwealth v. The German Society, 15 Pa. St. 251.

[3] Green v. African Methodist Church, 1 S. & R. 254.

[4] Society v. The Commonwealth, 52 Pa. St. 125.

actual amotion, has been held a sufficient ground for invoking the extraordinary aid of the courts by mandamus, and the writ has been granted against the board of directors of a chamber of commerce, to prevent them from depriving a member of his franchise by suspension.[1] But a distinction is taken between an actual removal from a corporate office, and a suspension which does not deprive the party of possession of his office, but only excludes him from participation in the profits of the corporation, without impairing his possession of the office, or his right to attend and vote at corporate meetings. And in the latter case, mandamus will not lie to restore the party aggrieved, since he has his remedy by an action for the tort against those who have disturbed him in the receipt of his profits.[2]

III. Corporate Books and Records.

§ 306. Mandamus lies to compel surrender of corporate books and records.
307. Production of books at corporate meeting; stockholder must show interest.
308. Writ granted for inspection of books.
309. Refused in England to trading corporation.
310. Not granted for mere curiosity; demand and refusal necessary.
311. To whom the writ should run.
312. Judgment creditor of corporation entitled to inspection.
313. Mandamus not granted to compel transfer of shares to purchaser on corporate books.
314. Departures from the rule.

§ 306. The control of the courts over the books and records of incorporated associations, and the juris- * 214 diction by mandamus to procure their delivery to or their inspection by the persons or officers properly entitled thereto, are, as we shall hereafter see, very freely exercised in

[1] State v. Chamber of Commerce, 20 Wis. 63.

[2] King v. Company of Free Fishers, 7 East, 353.

cases of municipal or public corporations. But the jurisdiction is not confined to corporations of a public nature alone, and is frequently exercised in the case of purely private corporations, for the protection of their officers and members, where they would be remediless in the ordinary course of proceedings at law. And the rule is well established, both upon principle and authority, that mandamus will lie to compel the surrender and delivery of corporate books and records to the officers properly entitled thereto. And where the term of office has expired, either by removal, or by lapse of time, and the officer refuses to surrender the corporate records and documents to his successor duly elected and entitled to their custody and control, mandamus will go to compel the delivery.[1] Thus, it will be granted to compel the clerk and the treasurer of a religious corporation, who have refused on the expiration of their term of office to deliver the corporate records to their successors, to make such delivery.[2]

* 215 So it will be granted upon the relation of a private manufacturing company, to require the surrender of its books and papers to the officers duly elected and entitled to their custody. Nor will the fact that the corporate offices are then filled by actual incumbents, holding the offices *de facto*, and in possession of the books, and exercising the functions of the offices, avail against the exercise of the jurisdiction.[3] And since the possession of the officer is regarded as the possession of the corporation, it is no sufficient objection to granting the writ that he has purchased the books with his own funds, nor will the relief be withheld because the corporation is still indebted to the officer for the purchase price of the books, or for arrears of salary.[4]

§ 307. The rule has been extended to compel the attend-

[1] American Railway Frog Co. *v.* Haven, 101 Mass. 398; State *v.* Goll, 3 Vroom, 285; St Luke's Church *v.* Slack, 7 Cush. 226; Rex *v.* Wildman, Stra. 879; Anon. 1 Barn. K. B. 402.

[2] St. Luke's Church *v.* Slack, 7 Cush. 226.

[3] American Railway Frog Co. *v.* Haven, 101 Mass. 398.

[4] State *v.* Goll, 3 Vroom, 285.

ance of a corporate officer with the books of the corporation at a meeting thereof.[1] But a stockholder will not be allowed by mandamus to compel the company to keep its books of account at the principal office or place of business of the corporation, when he fails to show any personal injury to himself resulting from the keeping of the corporate books elsewhere.[2]

§ 308. Mandamus is the appropriate remedy to enforce the rights of corporate stockholders and members to an inspection of the books and records of the incorporation, and the writ will issue for this purpose upon a proper showing of the relator's right and a refusal on the part of the corporate authorities to allow the inspection.[3] Thus, the writ will be granted to compel the cashier of a bank to submit the books of the bank to the inspection of one of the directors.[4] Nor is it sufficient ground for refusing the mandamus, that the book which it is sought to inspect is a book * 216 of accounts between the company and its shareholders, and therefore regarded as confidential, or that the information which it contains might be used for improper purposes.[5]

§ 309. The English rule is somewhat stricter, and confines the jurisdiction to narrower limits than is the case in this country. And the court of kings bench will not grant the writ to a mere trading corporation, such as the bank of England, upon the application of an individual member, to compel the directors of the corporation to produce their accounts and to divide their profits, since this would be, in effect, to allow one of several partners to compel his copartners, by mandamus, to produce their accounts of profit and loss, and to divide the profits. Such an object can only be

[1] *In re* Borough of Calne, Stra. 948.

[2] Pratt *v.* Meriden Cutlery Co. 35 Conn. 36.

[3] People *v.* Throop, 12 Wend. 183; People *v.* Pacific Mail Steamship Co. 50 Barb. 280.

[4] People *v.* Throop, 12 Wend. 183.

[5] People *v.* Pacific Mail Steamship Co. 50 Barb. 280.

accomplished by a bill in chancery, and the writ of mandamus will not be granted for this purpose.[1]

§ 310. It is to be borne in mind in the exercise of that branch of the jurisdiction by mandamus now under discussion, that the writ will not be granted merely to enable a corporator to gratify an idle curiosity in the examination of the corporate records, but he must show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination is desired. And unless there is some particular matter in dispute be-
* 217 tween members of the corporation, or between the corporation and its individual members, or some specific purpose for which the inspection is necessary, mandamus will not lie, since the courts will not permit the use of the writ upon merely speculative grounds, or to gratify a spirit of curiosity.[2] Nor will the writ be granted unless the relator shows that he has made a proper demand upon the proper parties having the records in custody, and that such demand was made at a fitting time and place and for a sufficient reason, and that the inspection was refused.[3]

§ 311. As regards the person to whom the writ should be directed when an inspection of corporate records is sought, the proper practice is to address it to the one actually having the custody of the books and records, even though he is merely a ministerial officer acting under the direction of others, as in the case of a bank cashier acting under a board of directors. In such case the rule applies that the writ should run to the particular person who is to perform the act required, and the cashier having charge of the books, his refusal to allow their inspection is his individual act, and the writ is therefore properly addressed to him. But there is

[1] King *v.* Bank of England, 2 Barn. & Ald. 669.

[2] People *v.* Walker, 9 Mich. 328; Hatch *v.* City Bank of New Orleans, 1 Rob. La. 470; King *v.* Merchant Tailors Co. 2 Barn. & Ad. 115.

[3] People *v.* Walker, 9 Mich. 328; King *v.* Wilts Canal Co. 3 Ad. & E. 477.

no impropriety in such a case in directing the writ also to the board of directors.[1]

§ 312. Similar relief may be allowed in behalf of a judgment creditor, when it is necessary for the proper enforcement of his rights under his execution. And where, under the laws of the state, a judgment creditor of an incorporated company is entitled to an execution against such shareholders as have not paid their shares, in satisfaction of his judgment, he may be allowed the aid of a mandamus to compel the company to permit an inspection of its books, for the purpose of ascertaining who are the shareholders, and the amount remaining unpaid on their respective shares.[2]

§ 313. In conformity with the general principle that mandamus will not lie when other adequate and * 218 specific remedy may be had at law, the courts refuse to lend their interference by this extraordinary writ for the purpose of compelling the transfer to a purchaser of shares of capital stock upon the books of an incorporated company, or to compel a company to issue certificates of stock. In all such cases full and complete satisfaction, equivalent to specific relief, may be had by an ordinary action at law to recover the value of the stock, and the existence of such other remedy is a complete bar to the exercise of the jurisdiction by mandamus, when it does not appear that the particular stock in question possesses any especial value over other stock of the corporation.[3]

§ 314. A departure from the rule as laid down in the preceding section is sometimes allowed, where, under the peculiar circumstances of the case the corporate offi- * 219 cer, whose duty it is to make the transfer of stock upon the books of the company, occupies for the time being the rela-

[1] People *v.* Throop, 12 Wend. 183.

[2] Queen *v.* Derbyshire etc. R. Co. 8 El. & Bl. 784.

[3] Shipley *v.* Mechanics' Bank, 10 Johns. Rep. 484; *Ex parte* Firman's Insurance Co. 6 Hill, 243; State *v.* Rombauer, 46 Mo. 155; Baker *v.* Marshall, 15 Minn. 177; Kimball *v.* Union Water Co. 44 Cal. 173; Birmingham Fire Insurance Co. *v.*

tion of a public officer, upon whom are imposed public duties of such a nature as to warrant interference by mandamus. For example, where it is provided by statute that in case of a levy upon and sale of shares of capital stock under execution, it shall be the duty of the proper officer of the corporation, upon presentation of the certificates of sale of such shares, to make the necessary transfer upon the books of the company, and to give the purchaser such evidence of title to the stock purchased as is usual and necessary with other stockholders, mandamus will lie to compel the performance of the duty. In such a case the corporate officer is regarded, *pro hac vice*, as a public officer, entrusted with the performance of a public

Commonwealth, 92 Pa. St. 72; State *v.* People's Building Association, 43 N. J. L. 389; State *v.* Guerrero, 12 Nev. 105; Murray *v.* Stevens, 110 Mass. 95; Stackpole *v.* Seymour, 127 Mass. 104; Durham *v.* Monumental Silver Mining Co. 9 Oregon, 41; King *v.* Bank of England, Doug. 524. But see, *contra*, State *v.* McIver, 2 Rich. N. S. 25; Regina *v.* Midland Counties & Shannon Junction R. Co. 9 L. T. R. N. S. 151, where it is held that the duties of officers of a railway company to make the transfer of stock upon the books of the company in favor of a purchaser, are of such a nature as to warrant the writ to compel such transfer, the ordinary remedy by action being held insufficient. And to the same effect is Phillips *v.* New Orleans Gas Light Co. 25 La. An. 413. The rule, however, as laid down in the text, is supported by the clear weight of authority, and commends itself as more in harmony with the general principles governing the law of mandamus. As is said in Shipley *v.* Mechanics' Bank, 10 Johns. Rep. 484: "The applicants have an adequate remedy, by a special action on the case, to recover the value of the stock, if the bank have unduly refused to transfer it. There is no need of the extraordinary remedy by mandamus, in so ordinary a case. It might as well be required in every case where trover would lie. It is not a matter of public concern, as in the case of public records and documents; and there can not be any necessity, or even a desire of possessing the identical shares in question. By recovering the market value of them, at the time of the demand, they can be replaced. This is not the case of a specific and favorite chattel, to which there might exist the *pretium affectionis*. The case of The King *v.* The Bank of England, Doug. 524, is in point, and this remedy in that case was denied. Motion denied." In Regina *v.* Midland Counties & Shannon Junction R. Co. 9 L. T. R. N. S. 151, the writ was refused to compel the transfer on the ground of infancy of the purchaser.

duty, and thus subject to the control of the courts by mandamus.[1] So the writ may be granted to require a corporation to enter upon its books the probate of the will of a deceased shareholder, disposing of his shares in the company, leaving all doubts as to the question of the right to the shares so disposed of to be shown by the corporation in its return to the writ.[2] And where the duty is incumbent upon a corporation by the terms of its charter to enter upon the register of the corporation the names of all the owners of its capital stock, this duty may be enforced by mandamus.[3] But the writ will not lie to enforce the transfer upon the corporate books of shares of capital stock purchased by the relator under proceedings in attachment, where the shares have been previously transferred and new certificates have been issued to a person showing *prima facie* title thereto, before the proceedings in attachment were issued. The relief, in such case, is refused on the ground that mandamus never lies except in a plain case.[4]

[1] Bailey *v.* Strohecker, 38 Geo. 259. See also Memphis Appeal Publishing Co. *v.* Pike, 9 Heisk. 697.

[2] Rex *v.* Worcester & Birmingham Canal, 1 Man. & Ry. 529.

[3] Norris *v.* The Irish Land Company, 8 El. & Bl. 512.

[4] State *v.* Warren Foundry and Machine Company, 3 Vroom, 439.

IV. Railways, Canals and Public Improvements.

§ 315. Mandamus formerly granted to compel completion of railway.
316. The English rule reversed.
317. An open question here; but writ may be granted after completion of railway.
318. Writ granted for damages for land taken.
319. Construction of bridges enforced by mandamus; remedy by indictment no bar.
320. Railway crossings and approaches thereto.
320 *a*. Erection of depot; delivery of stock; freight charges; issuing bonds; mandamus against receiver.
321. Contract obligations not enforced by mandamus.
322. Writ granted for delivery of grain to warehouse.
322 *a*. Granted to compel delivery of freight and passenger list; payment of taxes.

§ 315. The extent to which the courts may prop-
* 220 erly interfere with corporate bodies engaged in works of public improvement, such as railways, docks and canals, and may control their action for the purpose of compelling them to carry out the terms and perform the conditions of their charters, forms an interesting branch of the law of mandamus, and has given rise to some conflict of authority. The doctrine was formerly maintained by the court of kings bench, that where an incorporated company, such as a railway, chartered by act of parliament, with compulsory powers for taking the necessary lands in the construction of its road, had exercised its right of eminent domain, and had entered upon and completed a portion of its line, mandamus would lie at the suit of a land-owner whose land had been taken, or who might be prejudiced by the non-completion of the road, to compel its completion. The reasoning upon which the court interfered in such cases was, that the railway, having exercised the extraordinary powers conferred upon it over the lands of private persons, could not be considered merely in the light of an

ordinary purchaser of lands, at liberty to convert them to any purposes which it might see fit, but that an imperative obligation was thereby created on the part of the corporation, to devote the land taken to the purposes for which it was acquired, which obligation could only be adequately enforced by mandamus.[1] And it was held, too, that the * 221 relief might be granted at the instance of a shareholder in the company, as well as an adjoining land-owner.[2]

§ 316. The principle, however, thus attempted to be established by the kings bench, was afterwards overthrown on error to the exchequer chamber, and the English rule may now be regarded as well settled, that mandamus will not lie in this class of cases. And where a railway company is incorporated, with the usual grants of the right of eminent domain, and permission is given the company to construct its road as proposed, such permission imposes no imperative duty upon the corporation to proceed with the work, the statute being construed as permissive and not obligatory. Nor does the acceptance of its charter by the railway company create such a contract with the public, or with individual land-owners, as to make it obligatory upon the company to construct the road proposed.[3] And although acts of incor-

[1] Queen *v.* York & North Midland R. Co. 1 El. & Bl. 178, reversed on error in the exchequer chamber, Ib. 858; Queen *v.* Eastern Counties R. Co. 10 Ad. & E. 531; Queen *v.* York, Newcastle & Berwick R. Co. 16 Ad. & E. N. S. 886; Queen *v.* Great Western R. Co. 1 El. & Bl. 253, reversed on error in the exchequer chamber, Ib. 874. And see Queen *v.* Bristol Dock Co. 2 Ad. & E. N. S. 64. But see Queen *v.* Rochdale & Halifax Turnpike, 12 Ad. & E. N. S 448; Queen *v.* Bristol & Exeter R. Co. 4 Ad. & E. N. S. 162; King *v.* Brecknock Canal Co. 3 Ad. & E. 217.

[2] Queen *v.* Ambergate etc. R. Co. 17 Ad. & E. N. S. 362.

[3] York & North Midland R. Co. *v.* The Queen, 1 El. & Bl. 858, reversing same case, Ib. 178; Great Western R. Co. *v.* The Queen, 1 El. & Bl. 874, reversing same case Ib. 253. York & North Midland R. Co. *v.* The Queen, is the leading English case upon the doctrine under discussion. This was a writ of error to the exchequer chamber, from a judgment of the queens bench, upon a demurrer to a return to a mandamus, commanding the plaintiff in error, the defendant below, to purchase lands and make a

poration of railway companies are frequently spoken
* 222 of as contracts, they can not, strictly speaking, be construed as such, where they confer only conditional powers. In such cases, the powers, if acted upon, carry with them corresponding duties, but, if not acted upon, they are not regarded as imperative upon the companies. To assert the existence of a contract between the land-owners
* 223 and the company, by which the latter is bound to complete its road, is only begging the question, since, as between these parties, the real issue is whether there is such a contract, and this can not be inferred from a permissive or enabling statute. It follows necessarily from these
* 224 views, that where a railway company, under an act of incorporation creating no compulsory obligation to construct its road, has completed the principal portion of its line, and has then abandoned the residue because it passes through a country thinly populated, where the road, if constructed, would not prove remunerative, mandamus
* 225 will not lie to compel its completion, where no corrupt motives are imputed to the company in abandoning the line.[1]

§ 317. In the absence of any American decisions bearing directly upon the principle under discussion, the question may still be regarded as an open one in this country, although no reason is perceived why the rule of non-interference, adopted by the exchequer chamber, should not be recognized and followed here as well as in England. After the com-

railway between certain designated points, pursuant to its acts of incorporation. The court below had rendered judgment for the prosecutors, and awarded a peremptory mandamus to complete the railway. (See Queen v. York & North Midland R. Co. 1 El. & Bl. 178.) This judgment of the court of queens bench, awarding the peremptory mandamus, was reversed. In conformity with this decision, the judgment of the queens bench in Regina v. Lancashire & Yorkshire R. Co. 1 El. & Bl. 228, was also reversed, and the doctrine of the text may therefore be regarded as conclusively established in England.

[1] York & North Midland R. Co. v. The Queen, 1 El. & Bl. 858.

pletion of the railway, however, the case would seem to stand upon a different footing, and the broad doctrine has been maintained, that, after the completion of the work, the corporation may be compelled by mandamus to fairly and fully carry out the objects for which it was created. Thus, where by the terms of its charter a railway is required to transport passengers to a particular point or terminus, it may be compelled by mandamus to conform to its charter obligations in this particular.[1] And where the act of incorporation provided that the public should have the use and enjoyment of the railway upon the payment of certain rates, and the company afterwards took up certain portions of its track, mandamus was granted to compel the re-placing of such portions. And this was allowed, notwithstanding the liability of the corporation by indictment, the remedy by indictment being regarded as far less effective in such a case than that by mandamus.[2]

§ 318. The writ has frequently been granted to protect the rights of land-owners to compensation for their lands taken in the construction of works of public improvement. And where a railway, or other corporation, is vested with the right of eminent domain, it may be compelled by mandamus to take the necessary steps for summoning a jury to assess damages for the property taken or damaged, * 226 and it may even be required by the writ to make payment of the amount of damages so assessed, in the absence of any other specific or adequate remedy.[3]

§ 319. The duty incumbent upon railway and other corporations engaged in works of public improvement, of constructing their bridges in accordance with the requirements of their charters, or in such manner as to avoid danger or

[1] State v. The Hartford & N. H. R. Co. 29 Conn. 538.

[2] King v. Severn & Wye R. Co. 2 Barn. & Ald. 644.

[3] Queen v. Eastern Counties R. Co. 2 Ad. & E. N. S. 347; King v. Water Works Co. 6 Ad. & E. 355; Queen v. Trustees of Swansea Harbor, 8 Ad. & E. 439; Queen v. Deptford Pier Co. Ib. 910.

inconvenience to the public and to prevent the obstruction of navigation, may properly be enforced by mandamus.[1] Thus, a railway company may be compelled so to construct its bridge across a navigable stream, in the manner prescribed by its charter, as not to obstruct the navigation of the stream.[2] So a bridge company, which, by the terms of its charter, is required to maintain and forever keep in repair a certain bridge, may be compelled by mandamus to perform this duty. And it does not constitute a sufficient objection to the exercise of the jurisdiction by mandamus in such a case, that the offense is a nuisance, for which an indictment might lie, since the duty to erect and keep in repair the bridge is a public duty, the specific performance of which is the chief thing sought, and for which mandamus is the most appropriate remedy.[3] Indeed, relief has been granted in this class of cases for the express purpose of redressing a grievance in the nature of a nuisance. Thus, where it is the duty of a canal company to construct a bridge over a road which is obstructed by its canal, this duty may be enforced by mandamus, since there is no other adequate remedy at law. And while, in such a case, pecuniary damages might compensate for the past injury and obstruction of the road, such damages
* 227 would afford no redress for the future, since the obstruction would still remain.[4] So where the duty of erecting a bridge is so plainly incumbent upon a corporation that the court has no doubt as to the question of obligation, and the omission to perform the duty is admitted, mandamus will lie, even though there may be a remedy by indictment, the latter not being regarded as a specific remedy to compel the performance of the particular thing sought.[5]

[1] State v. Wilmington Bridge Co. 3 Harring. 312; State v. Northeastern R. Co. 9 Rich. 247; *In re* Trenton Water Power Co. Spencer, 659; Habersham v. Savannah & Ogechee Canal Co. 26 Geo. 665.

[2] State v. Northeastern R. Co. 9 Rich. 247.

[3] State v. Wilmington Bridge Co. 3 Harring. 312.

[4] Habersham v. Savannah & Ogechee Canal Co. 26 Geo. 665.

[5] *In re* Trenton Water Power Co. Spencer, 659.

§ 320. The obligation of railway companies to construct and maintain proper crossings and suitable approaches thereto at all points where their lines of railway intersect public streets or highways, and to leave all such highways as they may cross in a safe condition for the use of the public, is an obligation which may properly be enforced by the aid of mandamus.[1] And the right of the courts to interfere in such cases for the protection of the public would seem to be the same, whether grounded upon the common-law obligation of railway companies to maintain their crossings in a safe condition, or upon express provisions of their charters affirming and declaring the common-law duty.[2] So when it is the duty of a railway company to construct a crossing of a given character at such place as may be designated by the owner of land over which the railway passes, the performance of this duty may be coerced by mandamus.[3] So when a railway company is granted the right of way through a city and certain conditions are annexed to the grant and embodied in the ordinance, requiring the company to maintain all necessary crossings, approaches and culverts at points where the track runs upon or across the streets and alleys of the city, and to make such crossings and approaches of suitable construction for the convenient passage of persons and vehicles, mandamus lies to compel the performance of these conditions.[4] And mandamus will go to compel a railway company to restore a highway over which it has constructed its road, as required by law, although such restoration may require the company to resort to proceedings for the compulsory taking of land.[5] But where, by its act of incorporation, a railway company has an option at its point of crossing a highway, either to carry its track over the highway,

[1] People v. Chicago & Alton R. Co. 67 Ill. 118; Indianapolis & Cincinnati R. Co. v. The State, 37 Ind. 489.

[2] People v. Chicago & Alton R. Co. 67 Ill. 118.

[3] Boggs v. C. B. & Q. R. Co. 54 Iowa, 435.

[4] Indianapolis & Cincinnati R. Co. v. The State, 37 Ind. 489.

[5] People v. Dutchess & C. R. Co. 58 N. Y. 152.

* 228 or the highway over its track, a mandamus commanding the company to do one of these things in the alternative is defective, if the record fails to show that it is impossible that the other branch of the alternative can be performed.[1]

§ 320 *a*. Mandamus being the appropriate remedy to compel a railway company to perform the public duties required of it by its charter, the writ will go to direct a company to erect and maintain a depot, this duty being imposed upon it by law.[2] And when it is the duty of a railway company to receive certain tax receipts in payment of freight or passage over its line, this duty may be enforced by mandamus, there being no other specific and adequate remedy.[3] So a railway company may be required by mandamus to deliver shares of its capital stock to a municipal corporation, to which the latter is entitled in exchange for its bonds.[4] The writ will not, however, be used to relieve against excessive freight charges, the remedy at law being regarded as adequate in such case.[5] Nor will it go to compel a company to issue to its creditors bonds secured by mortgage, when the relief sought is in the nature of specific performance of a contract to secure the indebtedness by mortgage, and when other incumbrances have intervened and the property affected has passed into the hands of purchasers who are not before the court.[6] And when a railway company is in the hands of a receiver, appointed by a court of competent jurisdiction, who is operating the road under the direction of the court, man-

[1] Queen *v.* Southeastern R. Co. 4 H. L. Ca. 471.

[2] Railroad Commissioners *v.* P. & O. C. R. Co. 63 Me. 269.

[3] Mobile & O. R. Co. *v.* Wisdom, 5 Heisk. 125. As to the use of mandamus to command a railway company to resume the use of a station which 't has abandoned, see State *v.* New Haven & N. Co. 41 Conn. 134.

[4] State *v.* Cheraw & C. R. Co. 16 S. C. 524.

[5] State *v.* Mobile & M. R. Co. 59 Ala. 321.

[6] Ham *v.* Toledo, W. & W. R. Co. 29 Ohio St. 174.

damus will not lie against the company and its receiver to control their conduct in the operation of the road.[1]

§ 321. Duties imposed upon a corporation, not by virtue of express law or by the conditions of its charter, but arising out of contract relations, will not be enforced by mandamus, since the use of the writ is limited to the enforcement of obligations imposed by law.[2] Thus, the writ will not go to a turnpike company, to compel it to keep a bridge in repair upon the ground of its having contracted so to do with the officers of the county.[3] Nor will it be used to command a bridge company to rebuild and maintain a bridge over a river, the obligation, if any, resting only in contract.[4] And when the charter of a railway company requires it to enter into a contract for the performance of a specific act, and it enters into such contract accordingly, mandamus will not lie for the performance of the contract, but the party aggrieved will be left to the ordinary remedy.[5]

§ 322. Mandamus has been held to be the proper remedy to compel a railway company to deliver to a particular warehouse or grain elevator grain consigned thereto in bulk along the line of railway, the warehouse itself being situated upon the line of respondent's road, with facilities for the delivery of grain equal to those of other warehouses at which the railway delivers, and the carriage of grain in bulk being a part of the regular business of the road. The right to relief by mandamus in such case is based upon the duty or obligation of the railway company as a common carrier, and the want of any other adequate remedy at law.[6]

§ 322 *a*. The writ has also been granted to compel the

[1] State *v.* Marietta & C. R. Co. 35 Ohio St. 154.

[2] State *v.* Zanesville Turnpike Co. 16 Ohio St. 308; State *v.* Paterson, N. & N. Y. R. Co. 43 N. J. L. 505; State *v.* Republican River Bridge Co. 20 Kan. 404.

[3] State *v.* Zanesville Turnpike Co. 16 Ohio St. 308.

[4] State *v.* Republican River Bridge Co. 20 Kan. 404.

[5] State *v.* Paterson, N. & N. Y. R. Co. 43 N. J. L. 505.

[6] Chicago & Northwestern R. Co. *v.* The People, 56 Ill. 365.

owners of steamboats to furnish to the proper authorities of the state a list of the amount of freight and of the number of passengers transported by them, the duty of furnishing such list being fixed by a statute of the state.[1] And in Maryland the writ has been granted to compel the payment by railway corporations of taxes which have been assessed upon their capital stock.[2]

[1] Board of Commissioners *v.* Willamette, T. & L. Co. 6 Oregon, 219.

[2] Emory *v.* The State, 41 Md. 38; Barney *v.* The State, 42 Md. 480.

CHAPTER V.

OF MANDAMUS TO MUNICIPAL CORPORATIONS.

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I. PRINCIPLES ON WHICH THE JURISDICTION IS EXERCISED.

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§ 323. The vast interests entrusted to the care of * 230 municipal and public corporations, as well as the extraordinary powers, partaking both of a legislative and of a judicial character which are exercised by these bodies, have occasioned frequent applications for the aid of the courts by mandamus to compel the proper performance of their corporate duties, and to set them in motion when they have refused to act upon matters falling within the scope of their well-defined powers.[1] And while it is true, as we shall hereafter see, that in all matters entrusted to or properly resting in the judgment and discretion of such bodies, or their officers, and upon which they have actually passed, mandamus will not lie to control their decision, it is still the most efficient remedy and is freely granted to set them in motion and to enforce action, when they have refused to act at all.[2]

§ 324. Mandamus has been fitly termed the spur by which municipal officers are moved to the performance of their duty.[3] And it may be affirmed as a general rule, sanctioned by the best authorities, that when a plain and imperative duty is specifically imposed by law upon the officers of a municipal corporation, so that in its performance they act merely in a ministerial capacity, without being called upon to exercise their own judgment as to whether the duty shall or shall not be performed, mandamus is the only adequate remedy to set them in motion, and the writ is freely granted in such cases, the ordinary remedies at law being unavailing.[4] As illustrating the rule, it is held that when county commissioners are required by a plain and positive statute to

[1] In Dillon on Municipal Corporations, Ch. XX, will be found a very full and satisfactory collection of authorities bearing upon the subject-matter here discussed.

[2] Supervisor of Sand Lake v. Supervisor of Berlin, 2 Cow. 485; Pfister v. Board of Commissioners, 82 Ind. 382; Albin v. Board of Directors, 58 Iowa, 77.

[3] Howe v. Commissioners of Crawford Co. 47 Pa. St. 361.

[4] Humboldt Co. v. Churchill Co. 6 Nev. 30; Hall v. Selectmen of Somersworth, 39 N.H. 511; *Ex parte* Common Council of Albany, 3 Cow.

set aside a certain portion of the county funds annually for a specific purpose, and have refused to perform this duty, they may be compelled to act by mandamus.[1] So where, under the statutes of a state, it is made the imperative * 231 duty of town authorities to appropriate and pay over a certain percentage of the taxation of the town for the support of teacher's institutes, the payment may be enforced by mandamus, there being no other adequate remedy, by action at law or otherwise.[2] So, too, where the legislature has directed the municipal authorities of a city to create a public fund or stock for a particular purpose, the writ may issue to the common council of the city, requiring them to pass the necessary ordinance for creating the stock, since the obligation laid upon them is imperative, and they have no discretion as to its performance.[3] And where a board of municipal officers are required by law to raise for the support of the poor so much money annually as may be fixed by another board, entrusted with full power as to determining the amount thus to be raised, the duty of raising the money may be enforced by mandamus, there being no discretion left to the officers, and their duty being purely of a ministerial nature.[4] So where it is made the duty of a town clerk to record surveys of highways made by the highway commissioners of the town, the performance of the duty may be coerced by mandamus. And in such case, it constitutes no sufficient return to the writ to allege that the commissioners had not duly qualified, since the validity of their title can

358; People *v.* Common Council of New York, 45 Barb. 473; People *v.* Collins, 7 Johns. Rep. 549; People *v.* Supervisors of Sullivan Co. 56 N. Y. 249; People *v.* Green, 64 N. Y. 499; People *v.* Supervisors of Ontario, 85 N.Y. 323; City of Lafayette *v.* The State, 69 Ind. 218; Overseers of Porter Township *v.* Overseers of Jersey Shore, 82 Pa. St. 275; Henry *v.* Taylor, 57 Iowa, 72.

[1] Humboldt Co. *v.* Churchill Co. 6 Nev. 30.

[2] Hall *v.* Selectmen of Somersworth, 39 N. H. 511.

[3] People *v.* Common Council of New York, 45 Barb. 473.

[4] *Ex parte* Common Council of Albany, 8 Cow. 358.

not be attacked collaterally, upon proceedings in mandamus, and it is not competent for a mere ministerial officer, such as a clerk, to adjudge the acts of the commissioners to be null and void.[1]

§ 324 *a*. Mandamus will also lie to compel the board of supervisors of a county to designate the newspapers in the county in which the public laws shall be published, when such duty is required of the supervisors by law.[2] So when it is the duty of the common council of a city to determine the amount of a bond to be given by certain officers, this duty may be enforced by mandamus.[3] And when the common council of a city, having full authority so to do, have directed the city comptroller to rent certain premises to be used for city purposes, mandamus will lie to require him to rent the premises as directed.[4] So the writ will go to the overseers of the poor of a township to require them to receive and provide for a pauper, when this duty is plainly incumbent upon them by law and there is no other adequate remedy.[5] But it will not go to command municipal officers to execute a contract which is illegal and unauthorized.[6] Nor will it go to compel aldermen to attend meetings of the common council of a city, there being no specific right involved, but only a general violation of public duty.[7]

§ 325. While, as we have thus seen, the courts are inclined to a somewhat liberal exercise of their jurisdiction by mandamus, for the purpose of coercing the performance of duties obligatory upon municipal corporations and their

[1] People *v.* Collins, 7 Johns. Rep. 549.

[2] People *v.* Supervisors of Sullivan Co. 56 N. Y. 249. And it is held in this case that any citizen of the county has such an interest in the subject-matter as to render him a competent relator in the proceeding.

[3] City of Lafayette *v.* The State, 69 Ind. 218.

[4] People *v.* Green, 64 N. Y. 499.

[5] Overseers of Porter Township *v.* Overseers of Jersey Shore, 82 Pa. St. 275.

[6] State *v.* Mayor of Newark, 35 N. J. L. 396; State *v.* Halsted, 39 N. J. L. 640.

[7] People *v.* Whipple, 41 Mich. 548.

officers, they yet refuse to trespass upon the limits of official discretion, and the principle applies with peculiar force to this class of cases, that mandamus will not lie * 232 to control the decision of officers entrusted with the power of determining any particular matter. Where, therefore, municipal authorities are by law entrusted with jurisdiction over certain matters, the decision of which rests in their sound discretion, and requires the exercise of their judgment, mandamus will not lie to control or in any manner interfere with their decision, since the courts will not direct in what manner the discretion of inferior tribunals and officers shall be exercised.[1] Thus, where county commissioners are by law authorized to erect certain public buildings, without being required to erect them in any particular time, the power of determining when the buildings shall be erected resting in their own judgment, they can not be compelled by mandamus to erect a particular building at a particular time, since this would substitute the judgment and opinion of the court in place of their own discretion.[2] And where the mayor of a city is invested with discretionary powers as to the leasing of certain lands, requiring the exercise of his judgment, he is not, as to such powers, subject to control by mandamus.[3]

§ 326. An excellent illustration of the rule is presented in the case of the approval of official bonds by municipal officers. And where certain town officers are entrusted by law with the power of approving the sufficiency of sureties upon the bonds of town constables, and of fixing the amount of the bonds, they will not be required by mandamus to approve a particular bond tendered.[4] Where, however,

[1] Commonwealth *v.* Henry, 49 Pa. St. 530; *Ex parte* Black, 1 Ohio St. 30; *In re* Prickett, Spencer, 134. And see Smith *v.* Mayor of Boston, 1 Gray, 72; Respublica *v.* Guardians of the Poor, 1 Yeates, (2nd edition.) 476; People *v.* Supervisors of La Salle Co. 84 Ill. 303; State *v.* Justices, 58 Mo. 583.

[2] *Ex parte* Black, 1 Ohio St. 30; State *v.* Justices, 58 Mo. 583.

[3] Commonwealth *v.* Henry, 49 Pa. St. 530.

[4] *In re* Prickett, Spencer, 134.

municipal officers whose duty it is to accept and approve of the bonds tendered by officers elect, have refused to act in the matter, the writ may issue for the purpose of setting them in motion, and the party aggrieved will not be required to resort to proceedings in quo warranto against the incumbent of the office.[1] But where a board of officers,
* 233 such as guardians of the poor of a city, are entrusted by law with the power of appointment to certain minor offices, the entire matter resting in their discretion, they will not be controlled as to the appointment by mandamus, since if inconvenience or hardship arises from the appointment actually made, the legislature, and not the court, is the proper forum to which resort should be had for relief.[2]

§ 327. The granting of licenses, being usually a matter of sound discretion, falls under the general rule above laid down. And whenever the authorities of a municipal corporation are entrusted with the power of granting licenses, such as for the sale of liquors, or the keeping of houses of entertainment, having discretionary powers in the matter, their discretion will not be interfered with by mandamus, and if they have once acted upon and decided an application the courts will not interfere to correct their decision.[3] So when a board of municipal officers are empowered to grant licenses upon due application to operate ferries, and have acted upon such applications, granting one and refusing another, the writ will not go to require them to grant a license to the unsuccessful applicant.[4] Otherwise, however, if the license has been refused under a mistaken construction of the law governing the case, and when a board of county supervisors, acting under a mistake as to the law, have refused a ferry license to which the applicant was clearly

[1] State *v.* Lewis, 10 Ohio St. 128.

[2] Respublica *v.* Guardians of the Poor, 1 Yeates, (2nd edition,) 476.

[3] City of Louisville *v.* Kean, 18 B. Mon. 9; *Ex parte* Persons, 1 Hill, 655; People *v.* Supervisors of San Francisco, 20 Cal. 591; Schlaudecker *v.* Marshall, 72 Pa. St. 200. See also People *v.* Village of Crotty, 93 Ill. 180; Purdy *v.* Sinton, 56 Cal. 133.

[4] Oxford Ferry Co. *v.* Commissioners of Sumner Co. 10 Kan. 293.

entitled, the writ has been allowed.[1] And the municipal authorities of a town may be required by mandamus to issue a license to sell liquors to one who is entitled thereto, when they have arbitrarily and capriciously refused such license.[2]

§ 328. It follows necessarily from the rule as above discussed and illustrated, that when municipal officers have once acted upon matters properly entrusted to their decision, they can not be compelled again to act upon the same matters. For example, when the mayor and common council of a city are empowered with the determination of the amount of damages to be paid to adjacent land-owners for injury sustained in the opening of a railway, and have rendered a final decision in the matter, mandamus will not lie to compel them to again consider the question.[3] So when a board of county supervisors are entrusted with the power to determine the size, cost and quality of materials for a county jail, and have acted in the matter and provided a jail, their discretion will not be reviewed upon an application for a mandamus to build a better jail, and the relief will be denied.[4] And the writ will not go to a board of county supervisors to call an election upon the question of a relocation of the county seat, when they have already passed upon the application and denied it, since it is not the province of a mandamus to correct the errors and mistakes of such bodies.[5]

§ 329. It has already been shown, in discussing the law of mandamus as applied to private corpora- * 234 tions, that the courts are inclined to a liberal use of the writ for the purpose of compelling the delivery of corporate books and records to the persons properly entitled thereto, as well as to procure an inspection of such books and records by a corporator entitled to such inspection.[6] The

[1] Thomas v. Armstrong, 7 Cal. 286.

[2] Zanone v. Mound City, 103 Ill. 552.

[3] Smith v. Mayor of Boston, 1 Gray, 72.

[4] People v. Supervisors of La Salle Co. 84 Ill. 303.

[5] State v. Nemaha Co. 10 Neb. 32.

[6] See § 306 *ante, et seq.*

jurisdiction over the records of municipal and public corporations rests upon similar principles, and the rule is well settled that mandamus will lie to compel the delivery of the books and records of such corporate bodies into the custody of the officers properly entitled thereto.[1] For example, a county treasurer may be required by the writ to deliver to the clerk of the county the books of account pertaining to his office, showing his receipts and disbursements during his term of office, when such books are required by law to be deposited with the clerk.[2] Nor does the fact that respondent has resigned his office and a successor has been elected and qualified, constitute sufficient ground for withholding relief.[3] So mandamus will lie in behalf of a board of municipal officers, such as the selectmen of a town, duly elected, to enforce the surrender of the books and records pertaining to their office, which are held by other persons claiming the office, the relief being granted in such a case on the ground of the inadequacy of the ordinary legal remedies.[4] Nor is it a sufficient objection to the issuing of the writ, that the person having custody of the corporate books claims them by way of security for money advanced for the corporation.[5] And mandamus will go to the person having custody of municipal records to compel their production at a corporate meeting.[6] So it lies to a former mayor of a city, to compel the delivery of the common seal of the city to his successor.[7] And a board of municipal officers, who are entitled to the custody of certain municipal bonds, may have the aid of a mandamus to procure their delivery from the person having them in charge.[8] But in all cases where the aid of a mandamus is

[1] Walter *v.* Belding, 24 Vt. 658; Kimball *v.* Lamprey, 19 N. H. 215; King *v.* Payn, 1 Nev. & P. 524; King *v.* Ingram, 1 Black. W. 50; City of Keokuk *v.* Merriam, 44 Iowa, 432.

[2] King *v.* Payn, 1 Nev. & P. 524.

[3] City of Keokuk *v.* Merriam, 44 Iowa, 432.

[4] Kimball *v.* Lamprey, 19 N. H. 215.

[5] King *v.* Ingram, 1 Black. W. 50.

[6] Anon. 2 Barn. K. B. 235.

[7] People *v.* Kilduff, 15 Ill. 492.

[8] Pearsons *v.* Ranlett, 110 Mass. 118.

invoked to procure the surrender of municipal records, it is incumbent upon the relator to clearly establish his right, and in the absence of a satisfactory showing in this respect the relief will be withheld. Thus, the members of a committee appointed by a town to audit the accounts of overseers of the poor, have no such interest in the books and * 235 papers kept by such overseers, as to entitle them to the extraordinary aid of a mandamus to compel their delivery. Such persons are not public officers, entitled to the custody of the books by virtue of their office, but are only the agents of the town, and the wrong being to the principal and not to the agent, the principal should seek redress.[1]

§ 329 *a*. Mandamus is also employed for the purpose of correcting errors in the records of the proceedings of municipal bodies. Thus, it will go to the clerk of the common council of a city to correct an inaccurate record of the council proceedings, kept by such clerk in his official capacity, upon the application of one who is specially interested in having such correction made.[2] So it lies to the chairman of a board of county supervisors to call a meeting of such board and to rectify its minutes.[3]

§ 330. Upon principles analogous to those already considered, the courts interfere by mandamus to compel municipal authorities to allow the inspection of their records by persons entitled thereto, and the writ will be granted in behalf of a member of the municipality, who is entitled to an inspection of its books, to permit him to make such inspection and to take copies and abstracts of the records at his own cost.[4] It is, of course, essential to the exercise of the jurisdiction in such cases, that the relator should show

[1] Bates *v.* Overseers of the Poor, 14 Gray, 163.

[2] Farrell *v.* King, 41 Conn. 448. But see Pond *v.* Parrott, 42 Conn. 13.

[3] People *v.* Brinkerhoff, 68 N. Y. 259. But the writ has been denied when sought to correct the records of a board of municipal officers, such records being under their own exclusive control. Wigginton *v.* Markley, 52 Cal. 411.

[4] Rex *v.* Guardians of Great Faringdon, 9 B. & C. 541.

some interest in the records which he seeks to inspect, and it may well be doubted whether the writ would in any case be allowed upon the relation of a mere stranger. But a resident within the municipality, who has been sued by the corporation for a violation of one of its by-laws, is entitled to the aid of a mandamus to procure an inspection of the books of the corporation, as far as they relate to the matter in dispute, and to compel the clerk of the corporation to furnish him with copies of its by-laws, at his expense.[1] And the writ may be granted to compel a register of deeds to allow the proper officers of the county to have access to the records for the purpose of making certain changes therein, which they are by law authorized to make.[2]

§ 331. Where the laws of a state provide that registrars of elections shall, as soon as possible after an election, deposit with the clerk of the county the original books of registration, to be preserved among the records of the county, the duty thus created is of such a nature as to come within the jurisdiction by mandamus, and the writ will go to compel such delivery.[3]

§ 332. The writ is sometimes granted against municipal officers or local boards entrusted with the management of schools. And where a uniform system of schools is provided by the constitution or laws of the state, to which all * 236 children of a certain age are entitled to admission, the school trustees or board of education may be required by mandamus to admit to school privileges a child of the required age whom they have excluded on account of color.[4] Where, however, it is provided by statute that the education of colored children shall be in separate schools, which have been provided accordingly, the writ will not go for the ad-

[1] Harrison v. Williams, 4 Dow. & Ry. 820.

[2] Hawes v. White, 66 Me. 305.

[3] McDiarmid v. Fitch, 27 Ark. 106.

[4] State v. Duffy, 7 Nev. 342; People v. Board of Education of Detroit, 18 Mich. 400; Clark v. Board of Directors, 24 Iowa, 266; Smith v. Directors, 40 Iowa, 518; Dove v. Independent School District, 41 Iowa, 689.

mission of colored children to a school allotted to whites.[1] Nor will it go to restore a child to a public school when, if granted, it would be unavailing, the term of school having elapsed.[2] But it will lie to compel school directors to admit to the public schools a pupil whom they have excluded for disregarding an order which was in excess of the powers of such directors.[3] So the writ will be granted against the officers of a school district, requiring them to conform to the law regulating the discharge of their duties, and to carry out the directions of the district, or to reinstate a teacher whom they have removed without authority for so doing.[4] But the courts will not interfere to correct a mere temporary irregularity in the affairs of a school district, such as a temporary removal of the school from the proper school house, no permanent injury being contemplated, and the period of such removal having almost expired.[5]

§ 332 *a*. When it is the duty of the directors of a school district to introduce into the public schools certain text books which have been legally adopted, the directors having no discretion in the premises, the performance of such duty may be exacted by mandamus.[6] And when the proper authorities of a school district have selected certain text books for use in their schools, and have afterward illegally attempted to change their action and to substitute other books, mandamus will lie upon the part of a parent to compel the school authorities to allow his children to use the text books legally selected.[7]

§ 333. Mandamus will lie to prevent a municipal officer from setting at naught the will of the corporation, by refusing to carry out its instructions. For example, where a city has, through its common council, directed the purchase

[1] Ward *v.* Flood, 48 Cal. 36.

[2] Cristman *v.* Peck, 90 Ill. 150.

[3] Perkins *v.* Board of Directors, 56 Iowa, 476.

[4] Gilman *v.* Bassett, 33 Conn. 298; Morley *v.* Power, 5 Lea, 691.

[5] Colt *v.* Roberts, 28 Conn. 330.

[6] State *v.* School Directors of Springfield, 74 Mo. 21.

[7] State *v.* Board of Education, 35 Ohio St. 368.

of certain lands, and that payment therefor be made in bonds of the corporation, but the officer whose duty it is to deliver the bonds refuses so to do, sufficient cause is presented for interference by mandamus, and the party aggrieved will not be put to his action for specific performance.[1]

§ 334. It being a common-law offense to refuse to serve in a public office to which one has been elected, mandamus will lie to compel a municipal officer, duly elected, to take the official oath and enter upon the duties of his office. And the writ will issue in such a case, notwithstanding he has paid a fine provided by a by-law of the corporation for not accepting an office, where the by-law does not declare that the fine shall be in lieu of service.[2] But it will not lie to compel a meeting of the authorities of a municipal corporation for the purpose of considering the removal of certain municipal officers because of their non-residence, even * 237 under a charter requiring all officers to be residents within the limits of the municipality, the granting of the writ for such purpose being without the sanction of precedent.[3]

§ 335. The writ may be granted for the protection of a municipal corporation against persons claiming to act for and represent it in a public or official capacity, but without authority. Thus, where certain persons claim to act as a building committee for the construction of public buildings, without being properly authorized so to act, they may be compelled by mandamus to surrender to the corporate authorities the plans and specifications in their possession for the construction of such public buildings.[4]

§ 336. While mandamus is the proper remedy to compel municipal officers having charge of a public fund, to

[1] People v. Brennan, 39 Barb. 522.

[2] King v. Bower, 1 B. & C. 247.

[3] King v. Mayor of Totness, 5 Dow. & Ry. 481. But the writ was granted in an early case in the kings bench, to compel a municipal corporation to admit an apprentice to his freedom. Townsend's case, 1 Lev. Part I, 91.

[4] State v. Kirkley, 29 Md. 85.

distribute money due from such fund to the persons properly entitled thereto,[1] yet the writ will not issue for this purpose where, if granted, it would prove unavailing. And where town trustees, having charge of public funds, are directed by an alternative mandamus to pay to certain religious societies amounts claimed as due them from such funds, the writ will not be made peremptory, if it appears by the return that the predecessors of the trustees to whom the alternative writ was directed, had decided that the relators were not entitled to the money, and had accordingly distributed it to others. In such a case, the money not being subject to the order of the respondents, the peremptory writ, if granted, must necessarily prove unavailing, and this of itself constitutes a sufficient objection to its being granted.[2]

§ 337. As regards the parties to whom the writ should be directed, where its purpose is to compel the performance of official duties incumbent upon a municipal corporation, the earlier English practice was to direct it to the body politic by its corporate name, and it has been held a * 238 sufficient ground for quashing the writ that it was not thus directed, but ran to the mayor and aldermen of the municipality.[3] In this country, however, the earlier rule has not been followed, and it seems to be settled that the writ may properly be directed to the mayor and aldermen, without running to the municipality in its corporate name.[4] And since proceedings by mandamus against municipal officers to compel the performance of their official duties, are virtually proceedings against the corporation itself, rather than its individual officers, it is no bar to the exercise of the jurisdiction against a board of such officers, that the term of a portion of them has expired and that a new board, composed

[1] East Saginaw v. Saginaw Co. Treasurer, 44 Mich. 273.

[2] State v. Trustees of Warren Co. 1 Ohio (2nd edition), 300; Universal Church v. Trustees, 6 Ohio, 445.

[3] Regina v. Mayor of Hereford, 2 Salk. 701. And see King v. Taylor, 8 Salk. 231. But see King v. Mayor of Abingdon, Ld. Raym. 559.

[4] Mayor v. Lord, 9 Wal. 409. See also City Council v. Hickman, 57 Ala. 338.

in part of different members, has been formed.[1] And such a change in the membership of the board does not so change the parties as to abate the proceedings, the judgment of the court being obligatory upon the members of the board actually in office at the time of its rendition.[2] Upon the same principle of treating the proceedings against the municipal officer as procceedings instituted against him in his official, rather than in his individual capacity, it is held, where service of process and of the necessary papers has been had upon the officer, that any proceedings which they might warrant against him may be had against his successor, without beginning *de novo*.[3]

II. Auditing and Payment of Municipal Obligations.

§ 338. The jurisdiction stated.
339. Mandamus refused when claimant has other remedy.
340. Illustrations of the rule; remedy need not be a special one; inability of corporation to pay judgment.
341. The rule applied to salaries of municipal officers.
342. Writ refused against mayor to countersign warrant; doubt as to person entitled.
343. Writ refused to correct illegal tax.
344. Legal remedy must be adequate to bar mandamus.
345. Discretion of auditing officers not controlled by mandamus; the doctrine applied.
346. Writ refused when officers have passed upon and rejected demands.
347. Auditing board estopped by its own decision.
348. Distinction between setting officers in motion and controlling their action.
349. Mandamus the proper remedy to test jurisdiction of auditing officers.

[1] Maddox *v.* Graham, 2 Met. Ky. 56; Commissioners of Columbia *v.* Bryson, 13 Fla. 281. And see Clark *v.* McKenzie, 7 Bush, 523.

[2] Maddox *v.* Graham, 2 Met. Ky. 56; Commissioners of Columbia *v.* Bryson, 13 Fla. 281.

[3] State *v.* Gates, 22 Wis. 210; State *v.* City of Madison, 15 Wis. 30. And see Lindsey *v.* Auditor of Kentucky, 3 Bush, 231.

350. Services authorized by law and made a charge against county.
351. Mandamus lies to compel drawing of warrant for claim allowed; applications of the rule.
352. Want of funds a bar to relief.
353. Warrant for claim allowed by supervisors; permissive statute construed as obligatory.
354. Writ refused in aid of contracts *ultra vires*.
355. Relief barred by statute of limitations.
356. Mandamus lies for payment of claim allowed; the rule illustrated and applied.
357. Specific appropriation; special fund; want of funds; fraud; illegal appointment cured by subsequent legislation.
358. Refusal necessary; claim should be allowed; particular sum due should be shown.
358 *a*. Relief refused when anything remains to be done; want of notice; fraudulent claim.
359. Money must be held by the officer as corporate funds.
360. Liability must have been incurred by proper authority.
361. Writ refused when money may be recovered by action at law; claim not allowed; effect of garnishment.
362. Payment must be actually due; expiration of term; effect of injunction against payment.
363. Amount of payment limited by amount of fund; want of funds.
364. Duty of respondent must be shown; payment by delivery of municipal bonds.
365. Payment of judgments against municipality enforced by mandamus.
366. Issuing of municipal bonds for property condemned for public purposes.
367. Writ granted to compel delivery of funds from county treasurer to town treasurer.
367 *a*. Effect of delay; doubt as to right or duty.
367 *b*. Resignation no bar; *alias* writ.

§ 338. The auditing and payment of claims against municipal corporations, such as for salaries, services * 240 rendered, materials furnished and the like, have afforded frequent occasion for invoking the extraordinary aid of the courts by mandamus, in behalf of claimants against municipalities. The power of passing upon and allowing claims of this nature, though sometimes vested in a particular officer of the municipal corporation, more frequently rests with a board of officers, such as a board of supervisors of a county or town,

to whom is entrusted the duty of auditing claims which may be properly presented against the municipality.

§ 339. The first point to be observed in determining whether the courts will interfere in this class of cases, is whether any other legal and specific remedy exists, by action at law, or otherwise, adequate to afford relief to the party aggrieved. And the rule is too firmly established to admit of doubt or controversy, that if there be any other adequate and specific remedy, such as an action at law against the corporation, by which relief may be had by the aggrieved claimant, mandamus will not lie to compel municipal authorities or their auditing boards or officers, either to audit or pay claims against the corporation.[1] Indeed, the rule is simply the application of a principle underlying the entire * 241 jurisdiction by mandamus, that the existence of other adequate and specific legal remedy is a bar to relief by this extraordinary writ, and the court will only put in requisition their extraordinary powers in cases where no remedy may be had in the usual course of proceedings at law. And it is not the province of mandamus to settle differences of opinion between municipal authorities and claimants as to the amount due for services rendered. All such cases of disputed accounts or claims against the municipality should be referred to the arbitrament of a jury, or to the ordinary

[1] Mansfield *v.* Fuller, 50 Mo. 338; Ward *v.* County Court, Ib. 401; Commonwealth *v.* Commissioners of Allegheny, 16 S. & R. 317; Inhabitants of Lexington *v.* Mulliken, 7 Gray, 280; Wheelock *v.* Auditor, 130 Mass. 486; State *v.* Mayor of Lincoln, 4 Neb. 260; State *v.* Township Committee, 37 N. J. L. 84; Elmendorf *v.* Board of Finance, 41 N. J. L. 135; Portwood *v.* Montgomery Co. 52 Miss. 523; People *v.* Common Council of Detroit, 34 Mich. 201; People *v.* Clark Co. 50 Ill. 213; Commissioners of Johnson Co. *v.* Hicks, 2 Ind. 527; People *v.* Supervisors of Chenango, 11 N. Y. 563; People *v.* Mayor of New York, 25 Wend. 680; *Ex parte* Lynch, 2 Hill, 45; People *v.* Thompson, 25 Barb. 73; People *v.* Wood, 35 Barb. 653; People *v.* Booth, 49 Barb. 31; People *v.* Green, 58 N. Y. 295; Crandall *v.* Amador Co. 20 Cal. 72; State *v.* County Judge of Floyd, 5 Iowa, 380; Burnet *v.* Auditor, 12 Ohio, 54; State *v.* Supervisors of Sheboygan, 29 Wis. 79.

process of the courts, and they can not be determined by proceedings in mandamus.[1] And the fact that the claimant has lost his remedy at law, or is in such position that he can not avail himself of that remedy, will not warrant a mandamus, where his own laches has deprived him of his legal remedy.[2]

§ 340. Application of the rule above discussed has been made to the case of the holder of county orders, drawn upon the general fund of a county, and it is held that the holder of such orders, being entitled to judgment against the county in case of non-payment, must pursue that remedy, and is not entitled to the aid of a mandamus.[3] So where a statutory remedy is provided by action against a county in * 242 behalf of one aggrieved by the failure of the county board of supervisors to allow his claim, he will be left to pursue this remedy, and will be denied relief by mandamus.[4] It is not necessary, however, that the remedy afforded by law should be a special and particular remedy, provided for that particular case, but it is a sufficient bar to the exercise of the jurisdiction, as in case of the refusal of county authorities to audit a claim and draw their warrant for its payment, that a remedy exists by an action in the ordinary form against the county as a body corporate.[5] Nor is the application of the rule affected by the fact that the county will not have property out of which a judgment may be satisfied, if obtained. In such a case, the law affording the claimant a plain and adequate remedy by which his claim may be adjudicated and the amount be ascertained, the ability of

[1] Burnet *v.* Auditor, 12 Ohio, 54; Commonwealth *v.* Commissioners of Allegheny, 16 S. & R. 317. But in the latter case it is implied that after judgment against the municipal authorities, the writ may issue to enforce its payment. But see *Ex parte* Loy, 59 Ind. 235.

[2] State *v.* Supervisors of Sheboygan, 29 Wis. 79.

[3] People *v.* Clark County, 50 Ill. 213.

[4] Crandall *v.* Amador Co. 20 Cal. 72.

[5] State *v.* County Judge of Floyd, 5 Iowa, 380.

the debtor to pay the judgment is not a legitimate subject of inquiry on proceedings for a mandamus.[1]

§ 341. In conformity with the general rule it is held that mandamus will not lie to municipal authorities requiring them to pay salaries which are due from the corporation to its officers, a salary being regarded as an indebtedness of the corporation which may be enforced by an action of assumpsit, or by an action on the case for neglect of corporate duty, and mandamus is not designed as a remedy for the collection of debts.[2] And when the salary has already been paid to another person as the officer *de facto*, in actual posses-
* 243 sion of the office, the writ will not be granted to compel payment for the time thus covered, and the party aggrieved will be left to his remedy by action against him who has received the salary.[3] So the writ will not go to compel the payment of money due from a school district to a teacher, before judgment has been obtained for the amount due.[4]

§ 342. The writ does not lie to the mayor of a city to countersign a warrant for labor performed for the city under contract, even though the account has been approved by the city officers, since ample remedy exists by action against the city.[5] So when doubt exists as to the person properly entitled to the money, it being claimed by another person, who has brought suit therefor, mandamus will be refused, and the claimant will be left to his remedy by action against the corporation.[6]

§ 343. Mandamus will not lie against a board of county supervisors, requiring them to audit and allow a claim against the county for the amount of a tax illegally imposed by them

[1] State *v.* County Judge of Floyd, 5 Iowa, 380.

[2] People *v.* Mayor of N. Y. 25 Wend. 680; *Ex parte* Lynch, 2 Hill, 45; People *v.* Thompson, 25 Barb. 73. See, *contra*, People *v.* Smith, 77 N. Y. 347; Morley *v.* Power, 5 Lea, 691.

[3] People *v.* Brennan, 45 Barb. 457.

[4] Rogers *v.* The People, 68 Ill. 154.

[5] People *v.* Wood, 35 Barb. 653.

[6] People *v.* Booth, 49 Barb. 31.

and enforced by a sale of relator's property, the remedy by action at law against the supervisors being deemed sufficient.[1] Nor will the writ be granted to require a board of auditing officers to audit a demand which is not a legal charge against the municipality.[2]

§ 344. Notwithstanding the rule is well established denying the writ against municipal authorities for the enforcement of claims against the corporation, when other remedy may be had at law, it is to be accepted with the qualification that the existing legal remedy is adequate to meet the exigencies of the case. And where a person injured by the laying out of a highway has a remedy by a statutory action against the town for the amount of damages sustained, he may yet be entitled to a mandamus to compel the town supervisors to audit his claim, when it is probable that if judgment should be obtained against the town, its collection would have to be enforced by mandamus to the town authorities, directing them to levy a tax in payment of the judgment.[3]

§ 345. Another rule applicable to the class of cases under consideration and of equal importance with that already considered, is, that the exercise of the discretion properly vested by law in municipal bodies or their officers, as to the nature and amount of claims to be allowed against the corporation, is not subject to control by mandamus. And when a board of municipal authorities, or an officer of a * 244 municipal corporation, is entrusted with functions of a quasi-judicial nature in passing upon and allowing claims against the corporate body, requiring the exercise of judgment and discretion, the decision of such board or officer will not be revised by mandamus. And while the writ may properly issue to compel action upon a claim presented, it will not direct the particular action which shall be had, or

[1] People v. Supervisors of Chenango, 11 N. Y. 563.

[2] People v. Town Auditors, 74 N. Y. 310; People v. Board of Town Auditors, 75 N. Y. 316.

[3] State v. Wilson, 17 Wis. 687.

compel the allowance of any specified sum.[1] Thus, when a board of county supervisors is vested by law with discretionary powers as to the amount of salary to be allowed an officer of the county, they are not subject to control by mandamus as to the amount which they shall allow.[2] So when it is necessary for county supervisors, in passing upon an account presented against the county for services rendered, to determine the number of days of actual service, their decision as to this matter will be regarded as a judicial decision and not subject to revision by proceedings in mandamus.[3] And in general it may be said, that when the functions and powers of a board of auditing officers as prescribed by law are of a judicial nature, in respect to claims against the municipality, and not simply ministerial, and in the exercise of their duties they are obliged to hear and consider all objections presented, and to exercise their judgment upon the facts thus shown, their action can not be coerced or controlled by mandamus.[4]

§ 346. It follows, necessarily, from the doctrine discussed in the previous section, that where the authorities of a municipal corporation, vested with powers of a quasi-judicial nature as to the auditing and payment of demands against the body corporate, have exercised their judgment and passed upon claims within their jurisdiction and properly presented to them, their decision, like that of any judicial tribunal, is final and conclusive until reversed in a legal and * 245 proper manner, and mandamus will not lie to control such decision, or to compel the municipal authorities to audit or pay demands against the corporation which they have disallowed.[5] And the rule obtains, notwithstanding the

[1] Board of Police *v.* Grant, 17 Miss. 77; People *v.* Johnson, 17 Cal. 305; People *v.* Supervisors of Livingston Co. 26 Barb. 118; People *v.* Wood, 35 Barb. 653; People *v.* Board of Apportionment, 52 N. Y. 224.

[2] People *v.* Johnson, 17 Cal. 305.

[3] People *v.* Supervisors of Livingston Co. 26 Barb. 118.

[4] People *v.* Board of Apportionment, 52 N. Y. 224.

[5] Commonwealth *v.* County Commissioners, 5 Binn. 536; Tilden *v.* Supervisors of Sacramento Co. 41

party aggrieved is remediless at law, either by action or otherwise.[1] So when the duty is incumbent upon a county board of supervisors of auditing and passing upon certain demands against the county, as to which they are vested with discretionary powers, and in the exercise of their discretion they have passed upon and allowed the demands as to a part, but rejected the residue, mandamus will not lie, since the courts will not by this writ disturb the judgment of inferior tribunals upon matters properly resting within their jurisdiction.[2]

§ 347. Indeed, in the application of the rule, not only the court, but the auditing board itself is estopped * 246 by its decision, and will not be permitted to go behind it, or to question its propriety. Thus, when a board of county officers, vested with powers of a quasi-judicial nature as to the allowance of demands against the county, and with the power of levying a tax in payment of demands allowed, have passed upon and allowed a claim at a certain amount, for which they have issued their warrant, and mandamus is sought to compel them to levy a tax in payment of the amount, they can not go behind their former decision or question its correctness, and the peremptory writ will go in such a case to levy the tax.[3] The rule, however, is otherwise as to matters concerning which such boards are not vested with

Cal. 68; People *v.* Supervisors of Albany, 12 Johns. Rep. 414; People *v.* Supervisors of N. Y. 1 Hill, 362. And see Carroll *v.* Board of Police, 28 Miss. 38; Portwood *v.* Montgomery Co. 52 Miss. 523; State *v.* Commissioners of Hamilton Co. 26 Ohio St. 364. But see, *contra*, People *v.* Supervisors of Westchester, 73 N. Y. 173, where it is held that a board of county supervisors, having audited an account for services rendered, and having allowed more than was lawfully due, mandamus would lie in behalf of a tax-payer to direct the board to reconsider and revoke their action as to the excess allowed.

[1] Tilden *v.* Supervisors of Sacramento Co. 41 Cal. 68.

[2] People *v.* Supervisors of Albany, 12 Johns. Rep. 414; People *v.* Supervisors of N. Y. 1 Hill, 362; People *v.* Auditors of Wayne Co. 10 Mich. 307. And see Bright *v.* Supervisors of Chenango, 18 Johns. Rep. 242.

[3] Carroll *v.* Board of Police, 28 Miss. 38.

powers of a judicial nature, and as to which they merely act as agents of the county. And in such cases the courts may properly go behind the decision of the municipal authorities, and may inquire into the consideration out of which the original transaction grew.[1]

§ 348. In connection with the principles discussed in the preceding sections, an important distinction may here be noticed, which should be borne in mind in determining upon the propriety of interfering by mandamus with audit-
* 247 ing boards or officers of municipal corporations. It is the distinction between setting such officers in motion, and controlling their action when once in motion. And while, as the authorities cited above abundantly show, the writ will not issue to control or in any manner interfere with the decision of municipal tribunals as to demands against the municipality, upon which they have exercised their discretion, yet these decisions in no manner negative the right of interference for the purpose of setting the auditing boards or officers in motion, and compelling them to act when they have refused to proceed. And the rule is well established, that when such officers have refused to act upon municipal claims properly presented to them, and subject to their control, mandamus will lie to set them in motion and to compel them to audit and pass upon demands presented, without requiring them to render any particular decision, or to audit the demands at any specified amount. In other words, the courts may properly interfere to compel action on the part of such officers, without controlling the mode of their action, or determining its result.[2] Thus, the writ will issue to compel a board of county supervisors to proceed and audit a claim

[1] Beaman v. Board of Police, 42 Miss. 237.

[2] People v. Supervisors of San Francisco, 11 Cal. 42. And see Furman v. Knapp, 19 Johns. Rep. 248; Bright v. Supervisors of Cheuango, 18 Johns. Rep. 242; People v. Supervisors of N. Y. 32 N. Y. 473; People v. Supervisors of Delaware Co. 45 N. Y. 196; People v. Supervisors of Columbia Co. 67 N. Y. 330; People v. Supervisors of Macomb Co. 3 Mich. 475; Tuolumne Co. v Stanislaus Co. 6 Cal. 440.

against the county, for necessary expenses incurred by a county officer, in the performance of his official duties.[1] So it lies to direct a board of supervisors to audit the accounts of a sheriff for receiving and boarding prisoners in the county jail.[2] And in all such cases, the writ, instead of directing the officers to audit the account or draw their warrant for any particular sum, will command them to audit the claim and to issue their warrant for such sum as they shall allow.[3]

§ 349. We may go even further than the doctrine as stated in the preceding section, and may affirm that mandamus is the appropriate remedy to test the jurisdiction of municipal officers or boards as to demands and claims presented against the corporation whose representatives they are. And the writ affords the only plain, speedy and * 248 adequate remedy, to test the preliminary question of the jurisdiction of such officers, when they have refused to act for want of jurisdiction.[4] When, therefore, a board of auditing officers refuse to act upon demands presented for adjudication, upon the ground that they are not properly obligations for which the county is liable, the court, if satisfied that the demands are properly chargeable against the county, may require the board to act upon and audit such claims, without in any manner attempting to control or regulate the amount which shall be allowed.[5] It by no means follows, however, because mandamus is the proper remedy to test the jurisdiction of municipal authorities over the matter presented for their determination, that they will necessarily be compelled to exercise their power in that particular case, and if

[1] People v. Supervisors of N. Y. 32 N. Y. 473.

[2] People v. Supervisors of Columbia Co. 67 N. Y. 330.

[3] Tuolumne Co. v. Stanislaus Co. 6 Cal. 440.

[4] People v. Supervisors of San Francisco, 28 Cal. 429.

[5] Hull v. Supervisors of Oneida, 19 Johns. Rep. 259; Bright v. Supervisors of Chenango, 18 Johns. Rep. 242; People v. Supervisors of Delaware Co. 45 N. Y. 196.

the court is satisfied that the duty is not absolute and final, the peremptory writ may be withheld.[1]

§ 350. Where certain services are authorized by * 249 statute and made a charge against a county, mandamus will lie to its board of supervisors requiring them to receive and allow a claim against the county for the services thus rendered. Thus, where it is provided by statute that medical services rendered for the indigent sick of a county shall be made a charge upon the county, the duty imposed upon the supervisors of allowing a claim for such services is treated as an official duty, peremptory in its nature, which they are not at liberty to disregard, and in the discharge of which they can not be permitted to follow their own caprices. Mandamus will, therefore, lie in such a case to compel the performance of the duty.[2] So when a board of county supervisors, without passing upon the specific items, have made an arbitrary reduction from the gross amount of an account, including various items, the compensation for which is fixed by law, they may be required by mandamus to audit and pass upon the specific items.[3] And the writ will go to require a board of municipal officers to appoint an arbitrator to adjust a demand against the municipality, the duty of making such appointment being incumbent upon them by law.[4]

§ 351. As regards the mere act of drawing a warrant upon the treasurer or other municipal officer charged with payment, after a demand has been properly audited and allowed, by the officer or board charged with this duty, the case stands upon a different footing from the class of cases above

[1] People *v.* Supervisors of San Francisco, 28 Cal. 429.

[2] People *v.* Supervisors of Macomb Co. 3 Mich. 475. Otherwise, however, where the board has actually passed upon such a claim and audited it at a particular amount. And in such case the writ will not issue to compel the allowance of an amount which has been deducted from the account. People *v.* Auditors of Wayne Co. 10 Mich. 307.

[3] People *v.* Auditors of Elmira, 82 N. Y. 80.

[4] State *v.* Board of Finance, 38 N. J. L. 259.

considered, and there can be no valid objection to granting the writ for this purpose. In such cases, the amount of indebtedness due from the corporation being definitely fixed by the proper authority, there remains only the ministerial act of drawing the necessary warrant for its payment, and mandamus is the appropriate remedy to compel the performance of this duty.[1] Thus, the drawing of a warrant by a city comptroller, upon the city treasurer for the ascertained amount of an indebtedness admitted to be due from the city, is a purely ministerial act which may be enforced by mandamus.[2] And when the common council of a city, acting within the legitimate scope of their authority, have authorized the making of certain contracts, and the expenditure of certain moneys for the benefit of the city, and upon performance of the work, have ordered the money to be * 250 paid, a ministerial officer of the city who has been ordered to draw his warrant for the payment of the amounts due, will not be allowed to question the regularity or propriety of the action of the city, but will be compelled by mandamus to draw the warrant.[3] Nor is it a sufficient return to an alternative mandamus, directing a board of county auditors to draw a warrant upon the county treasurer for the amount of a claim against the county, that such warrant has already been drawn, but has been levied upon under execution against the claimant, and the peremptory writ will go in such a case.[4] And where money has been raised by taxation for the payment of a specific class of creditors, such as teachers in the public schools, and is in the hands of

[1] People v. Flagg, 16 Barb. 503; State v. Mount, 21 La. An. 352; State v. Buffalo Co. 6 Neb. 454; Jack v. Moore, 66 Ala. 184; People v. Auditors of Wayne Co. 5 Mich. 223; State v. Buckles, 39 Ind. 272; Apgar v. Trustees, 5 Vroom, 308; State v. Richter, 37 Wis. 275; Ryan v. Hoffman, 26 Ohio St. 109; State v. Fiedler, 43 N. J. L. 400; McLaughlin v. County Commissioners, 7 Rich. N. S. 375; People v. Green, 56 N. Y. 466. As to the necessary parties to such a proceeding, see State v. Richter, 37 Wis. 275.

[2] State v. Mount, 21 La. An. 352.

[3] People v. Flagg, 16 Barb. 503.

[4] People v. Auditors of Wayne Co. 5 Mich. 223.

the officer entrusted by law with the duty of making payment, the writ will lie on behalf of a teacher who has rendered services in accordance with the law, and who is entitled to payment out of the school fund, to compel the necessary officers to draw their order for the payment of the money, the remedy by action against the officers being regarded as inadequate.[1] But in all this class of cases, the relief is granted only when the amount of the demand has been definitely ascertained and fixed, in the manner provided by law. The writ, therefore, will not be granted to a county auditor, requiring him to issue an order for the payment of a claim against the county, when such officer is not himself authorized to fix the amount, and when it has not been fixed by the proper authority.[2] Nor will the writ go to direct the issuing of warrants for an amount claimed by the relator in excess of that to which he is legally entitled.[3]

§ 352. It is always a sufficient objection to the exercise of the jurisdiction by mandamus, that the writ, if granted, would prove unavailing. And it affords an insuperable objection to granting the relief that there are no funds out of which the warrant can be paid if drawn. When, therefore, it appears by the return to the alternative writ, that there is not sufficient money in the municipal treasury, out of which to satisfy the order or warrant, or that there are no funds except such as are necessary to satisfy the ordinary current expenses of the corporation, the peremptory writ will be refused.[4] And to warrant the relief in this class of cases it is incumbent upon the relator to show affirmatively that there are funds available from which the payment can be

[1] Apgar *v.* Trustees, 5 Vroom, 308.

[2] Commissioners *v.* Auditor, 1 Ohio St. 322; People *v.* Green, 56 N. Y. 466.

[3] Kemerer *v.* The State, 7 Neb. 130.

[4] Commonwealth *v.* Commissioners of Lancaster Co. 6 Binn. 5; Commonwealth *v.* Commissioners of Philadelphia Co. 1 Whart. 1; Same *v.* Same, 2 Whart. 286; State *v.* Macon County Court, 68 Mo. 29; Lancaster County *v.* The State, 18 Neb. 523. But see, *contra*, State *v.* Hoffman, 35 Ohio St. 435.

made, and failing in this he will be denied relief.[1] If, however, money has been appropriated for the specific payment in question, it is not a sufficient answer to an application for a mandamus to compel such payment to aver that the money has been wrongfully applied to other purposes. And in such case, the money may still be regarded, in contemplation of law, as remaining in the treasury.[2]

§ 353. Where, under the laws of the state, a board of county commissioners is vested with exclusive con- * 251 trol over all expenditures of county funds, mandamus will not lie to the county clerk to issue his order upon the treasurer for payment of a claim against the county, until it has been submitted to and approved by the board of commissioners.[3] But a county auditor may be compelled by mandamus to draw his warrant upon the treasurer of the county for the payment of a sum allowed by the board of county supervisors, who have appropriated the money and directed the auditor to draw his warrant therefor. And the writ will lie in such case, notwithstanding the action of the board of supervisors was unauthorized and illegal in the first instance, where it has been subsequently ratified by an act of legislature. In such cases, although the statute fixing the duty of the auditor is only permissive in terms, providing that he may draw his warrant upon the treasurer for a sum allowed by the supervisors, yet it will be construed as creating an imperative obligation, the word may being regarded as synonymous with the word shall, where public interests or the rights of third persons intervene.[4]

§ 354. Where, however, the aid of a mandamus is sought to compel a county auditor to draw his warrant upon the treasurer in payment of a claim against the county for services rendered, and the relator's right rests solely upon a contract

[1] State *v.* Smith, 8 Rich. N. S. 127; State *v.* Otoe Co. 10 Neb. 19; State *v.* Calhoun, 27 La. An. 167.

[2] People *v.* Comptroller of New York, 77 N. Y. 45.

[3] State *v.* Bonebrake, 4 Kan. 247.

[4] State *v.* Buckles, 39 Ind. 272.

with the county commissioners, in making which they have plainly exceeded their powers, the contract being *ultra vires*, mandamus will be refused, notwithstanding the claim has been passed upon and allowed by the commissioners who made the contract.[1]

§ 355. The right to relief in this class of cases may be barred by the statute of limitations.[2] And when a * 252 statute of limitations limits all actions against public officers, growing out of liabilities incurred by the doing of any act in an official capacity, or by the omission of any official duty, to three years from the time when the action accrued, the statute applies to a case where mandamus is sought to compel the clerk of a board of county supervisors to affix the seal of the county to warrants drawn upon the treasurer. In such case the statute will be held to run from the time of issuing the warrants, since it was then the immediate duty of the clerk to affix his seal, and his omission to perform that duty constituted the ground of action, for which he was at once liable to proceedings in mandamus.[3] So when the statute requires all actions founded on judgments to be brought within sixteen years, an application for a mandamus to procure the payment of a judgment against a county is held to fall within the statute.[4]

§ 356. The act of paying a demand or claim against a municipal corporation, after it has been duly audited and the amount fixed, like the act of drawing a warrant upon the disbursing officer just considered, is regarded merely as a ministerial duty, unattended with the exercise of any judgment or discretion, and hence subject to control by mandamus. And when claims against a municipal corporation have been duly audited and allowed and payment is ordered by the

[1] State v. Yeatman, 22 Ohio St. 546.

[2] Prescott v. Gonser, 34 Iowa, 175; Board of Supervisors v. Gordon, 82 Ill. 435. See also Auditor v. Halbert, 78 Ky. 577. But see Klein v. Supervisors, 54 Miss. 254.

[3] Prescott v. Gonser, 34 Iowa, 175.

[4] Board of Supervisors v. Gordon, 82 Ill. 435.

proper authority, and there remains only the ministerial duty on the part of the treasurer or other disbursing officer of making the payment, mandamus will lie for a refusal to perform this duty, there being no other adequate and specific remedy for the party aggrieved.[1] Thus, where town supervisors of roads are required by law to pay such orders as are drawn upon them by the proper authority for surveyor's services, and have refused to perform this duty, mandamus will lie, there being no other specific remedy. And the writ will issue in such case, even though an action might lie against the supervisors for breach of duty in refusing to make the payment, since such action must neces- * 253 sarily be brought against the supervisors in their private capacity, and a judgment against them would not authorize an execution to be levied on the treasury of the township.[2] So the writ lies to a county treasurer to compel the payment of sheriff's fees for services rendered the county in attending court, the services having been duly certified by the court, and there being no other effectual remedy, either by action against the county, or against its treasurer.[3] So, too, a county treasurer may be compelled by mandamus

[1] State *v.* Treasurer of Callaway Co. 43 Mo. 228; Commonwealth *v.* Johnson, 2 Binn. 275; Baker *v.* Johnson, 41 Me. 15; People *v.* Mahoney, 30 Mich. 100; People *v.* Edmonds, 15 Barb. 529; People *v.* Haws, 36 Barb. 59; People *v.* Palmer, 52 N. Y. 83; State *v.* Justices of Bollinger Co. Court, 48 Mo. 475; Hendricks *v.* Johnson, 45 Miss. 644; State *v.* Gandy, 12 Neb. 232; Thomas *v.* Smith, 1 Mont. 21; Chase *v.* Morrison, 40 Iowa, 620; Johnson *v.* Campbell, 39 Tex. 83; Potts *v.* The State, 75 Ind. 336. And see Carroll *v.* Board of Police, 28 Miss. 38; People *v.* Edmonds, 19 Barb. 468; People *v.* Opdyke, 40 Barb. 306. But it is held in Missouri that mandamus will not lie to compel the levy of a tax for the payment of warrants drawn upon the treasury of a municipal corporation, before such warrants have been reduced to judgment. State *v.* Trustees of Town of Pacific, 61 Mo. 155. See also State *v.* Clay County, 46 Mo. 231. As to the right to a mandamus to procure payment by a county treasurer of interest on county warrants, see Territory *v.* Gilbert, 1 Mont. 371.

[2] Commonwealth *v.* Johnson, 2 Binn. 275. But see State *v.* McCrillus, 4 Kan. 250.

[3] Baker *v.* Johnson, 41 Me. 15.

to pay money due to a public officer, as a judge, as additional compensation for services rendered, when such compensation has been authorized by act of legislature, and fixed by the board of county supervisors, and the claim of the relator has been duly presented, audited and allowed. In such case a clear and imperative duty rests upon the fiscal officer of the county to make the payment, and no other remedy exists, since the claim does not create a debt against the county for which an action would lie.[1]

§ 357. In further illustration of the rule, it is held that where a specific appropriation has been made, both by the legislature of the state and the common council of a city, for the payment of certain services rendered the city, and no remedy exists by action against the corporation, mandamus will lie to compel the payment.[2] So the writ will issue for the payment of a warrant drawn upon a special fund for a particular indebtedness against a county, since the warrant being on a special fund, no action at law lies against the county, and the ordinary remedy is thus unavailing.[3] So, too, when services are rendered to a county to be paid for in bonds of the county, and the work is accepted by the proper county officers, whose duty it is to deliver the bonds in payment, such duty may be enforced by mandamus, it being of a ministerial nature and involving the exercise of no discretion.[4] And in this class of cases, when a municipal officer is directed by the writ to make payment of a demand which has been duly allowed against the corporation, it does * 254 not constitute a sufficient return to show that he has no funds with which to make payment, without showing that he had no funds at the time when the several demands of payment were made. Nor is it a sufficient re-

[1] People *v.* Edmonds, 15 Barb. 529. And see Same *v.* Same, 19 Barb. 468, where the same principle is conceded, although the mandamus was refused on other grounds.

[2] People *v.* Haws, 36 Barb. 59. And see People *v.* Opdyke, 40 Barb. 306.

[3] State *v.* Justices of Bollinger Co. Court, 48 Mo. 475.

[4] Commissioners *v.* Hunt, 33 Ohio St. 169.

turn to allege that the warrant for the payment of the money was obtained by fraud and misrepresentation, without specifying the particular acts of fraud relied upon, since a statement of mere general conclusions of law is insufficient.[1] And the writ has been granted to require a city treasurer to pay interest upon bonds of the city, although the money in his hands had been appropriated to other purposes.[2] And the writ will go to compel a county treasurer to make payment for services rendered the county, under an appointment conceded to have been unconstitutional in the first instance, when the legislature of the state have by subsequent legislation recognized the validity of the demand for the services rendered, and have directed the money to be paid.[3]

§ 358. It is to be observed, however, since mandamus lies only to require the performance of an official duty which the officer has failed to discharge, that the writ will not be allowed in the class of cases under consideration, when the fiscal officer has not yet refused to make the payment, and the warrants have not yet been issued.[4] And if the delay on the part of the municipal authorities, after a request for payment, is not such as to raise a presumption of refusal to perform their duty, the relief may be withheld.[5] Neither will the writ be granted when the demand has not been properly audited and allowed.[6] Nor is it sufficient that the claimant in such cases should pray generally for the payment of what is due, without averring that some particular sum is due. And when the alternative writ and the petition on which it was granted are both deficient in this respect, a

[1] Hendricks v. Johnson, 45 Miss. 644.

[2] City of Williamsport v. Commonwealth, 90 Pa. St. 498.

[3] People v. Bradley, 7 Albany Law Journal, 92.

[4] State v. Mount, 21 La. An. 352. And see State v. Burbank, 22 La. An. 298; State v. Dubuclet, 24 La. An. 16; State v. Thorne, 9 Neb. 458.

[5] State v. Township Committee, 42 N. J. L. 531.

[6] People v. Green, 52 N. Y. 224; School District No. 9 v. School District No. 5, 40 Mich. 551.

motion to quash will be sustained, the defect being one of substance and not merely of form.[1]

§ 358 *a*. It is also to be noted that the relief will not be granted in the class of cases under consideration when anything remains to be done, or any fact to be ascertained to fix the relator's right.[2] So the writ will not go to compel the payment by a city of interest upon the amount found due to property owners for the taking of their property in opening a street, when the amount of interest has not been fixed by a verdict or judgment.[3] Nor will it go to direct a county treasurer to pay a demand against a county, when he has had no notice of the proceedings and no opportunity to show cause why the demand should not be paid.[4] And mandamus will not lie for the payment of a demand, a portion of which has been allowed through fraud and another portion without authority of law.[5]

§ 359. Another important limitation upon the right to relief, is, that the money from which the payment is required to be made, must be held by the fiscal officer for the corporation and as corporate funds, and the writ will not lie
* 255 to require a county auditor in his official capacity to pay money which has never been under the control of the county as county funds, but has simply been in the individual possession of the auditor.[6] And a county treasurer, as regards funds of the county in respect to which he is not placed in any direct relations with creditors of the county, and which he does not hold merely in a ministerial capacity to be paid to creditors on demand, but in his disbursements acts upon the warrants of other officers, can not be compelled by mandamus to make payment in a proceeding

[1] McCoy *v.* Justices of Harnett Co. 5 Jones, 265. See Same *v.* Same, 6 Jones, 488.

[2] Clayton *v.* McWilliams, 49 Miss. 311.

[3] Morris *v.* Mayor of Baltimore, 44 Md. 598.

[4] Payne *v.* Perkerson, 56 Ga. 672.

[5] People *v.* Wendell, 71 N. Y. 171.

[6] Thomas *v.* Auditor of Hamilton Co. 6 Ohio St. 113.

directed by the creditors, without the warrant of the proper auditing officers.[1]

§ 360. Again, it is to be observed that the jurisdiction is exercised only in cases where the services rendered to the corporation were contracted for by proper authority, and where the demand or claim has been audited by an officer or tribunal having jurisdiction of the subject-matter.[2] And a board of county commissioners can not be called upon by mandamus to make payment out of the public treasury for services contracted for by them, where they were not empowered by law to contract for such services, and were devoid of any legal authority for so doing.[3] So the writ will not go to a county treasurer to require payment of a demand which has been allowed and ordered paid by the board of supervisors of the county, where such board had no jurisdiction over the subject-matter and this fact appeared on the face of the account itself, since such approval is a mere nullity, and it is the duty of the treasurer to withhold payment.[4] And it is a good return by a county treasurer to an alternative mandamus commanding him to pay a warrant drawn by the county auditor, that the warrant was drawn for a demand not legally chargeable against the county, and this being shown the peremptory writ will be refused.[5]

§ 361. Nor will the courts interpose by mandamus to compel payment of a demand justly due from a municipal corporation, when other and adequate remedy may * 256 be had at law. Thus, where money for the payment of certain county bonds held by the relator is actually in the hands of the treasurer with which to make the payment, mandamus will be refused, when an action against the treasurer upon his official bond would afford a plain and efficient

[1] People v. Fogg, 11 Cal. 351.

[2] State v. Commissioners of Franklin Co. 21 Ohio St. 648; People v. Lawrence, 6 Hill, 244.

[3] State v. Commissioners of Franklin Co. 21 Ohio St. 648.

[4] People v. Lawrence, 6 Hill, 244.

[5] Keller v. Hyde, 20 Cal. 593.

remedy.[1] So the writ will not be granted to compel the payment of a demand against a county, which has not been allowed by the proper county authorities, or fixed by judgment.[2] And the writ has been refused to compel payment of a judgment against a county, when proceedings in garnishment were pending in another court against the county for the amount due upon such judgment.[3]

§ 362. Until payment is actually due from the municipal officer and the fund has come into his possession out of which to make the payment, the writ will not be granted, since the law does not contemplate such a degree of diligence as the performance of a duty not yet due. And until the officer has received the money and refused to apply it in the manner provided by law, there is no failure of duty, and hence no ground for mandamus.[4] And where the writ is sought against an officer in his official capacity, as a town treasurer, to compel the payment of public funds, but it is shown that before the issuing and service of the alternative writ his term of office had expired and his successor had been elected, to whom he had paid over all the public funds in his hands, such payment constitutes a sufficient defense to the writ, his proceedings appearing to have been conducted in good faith.[5] So where a town treasurer has been restrained by injunction from paying over certain money in his hands, mandamus will not go to compel the payment, since he is bound to obey the injunction as long as it exists.[6]

§ 363. Another important qualification of the general rule authorizing relief by mandamus, to compel the payment of demands justly due from municipal corporations, is, that the writ should be limited, as to the amount of payment ordered, to the amount in the particular fund out of which it

[1] State v. McCrillus, 4 Kan. 250; State v. Bridgman, 8 Kan. 458.

[2] State v. Commissioners of McLeod Co. 27 Minn. 90.

[3] State v. Commissioners of Otoe Co. 10 Neb. 384.

[4] State v. Burbank, 23 La. An. 298; State v. Dubuclet, 24 La. An. 16.

[5] State v. Lynch, 8 Ohio St. 347.

[6] State v. Kispert, 21 Wis. 387.

is required to be paid, and should never require the officer to pay more than there is in that particular fund.[1] And when, by his return, the officer shows that he has no funds on hand out of which the payment can be made, such return, if uncontradicted, is conclusive against granting the * 257 peremptory writ, since the courts will not interpose their extraordinary remedies when they are likely to be nugatory.[2]

§ 364. When it is sought to compel the mayor of a city to make payment to the relator for services alleged to have been performed under an order of the city council, it has been held incumbent upon the relator to show the law imposing the duty of payment upon the mayor, and failing to show this, and it being denied by the return, it is error to grant a peremptory mandamus.[3] And while the writ is proper to compel the treasurer of a city to pay warrants drawn upon him by the comptroller, yet he will not be required to deliver to the relator in satisfaction of his warrants the bonds of the city, the treasurer having a legal discretion to refuse such demand, and there being no duty incumbent upon him to make the payment in this manner.[4]

§ 365. The aid of mandamus is frequently invoked to compel the payment of demands against municipal corporations which have been reduced to judgment, when payment of the judgment has been refused, and the judgment creditor is remediless by the ordinary process of execution against the corporation. And it may be affirmed as a general rule, that where judgment has been recovered against a municipal corporation, and the ordinary remedy by execution is unavailing, a refusal by the proper authorities to make payment of the judgment will warrant relief by mandamus, it

[1] Day *v.* Callow, 39 Cal. 593; People *v.* Cook, Ib. 658; Rice *v.* Walker, 44 Iowa, 458. See also People *v.* East Saginaw, 40 Mich. 336.

[2] Mitchell *v.* Speer, 39 Geo. 56; People *v.* Frink, 32 Mich. 96.

[3] Smith *v.* Commonwealth, 41 Pa. St. 335.

[4] State *v.* Mount, 21 La. An. 369.

being the only remedy adequate to meet the grievance complained of.[1] Thus, where under the laws of the state judgments against a township can not be enforced by execution, but are to be collected like all other township charges, the writ will lie against the municipal authorities to enforce the payment of a judgment.[2] And where a county
* 258 treasurer has money in his hands which has been collected for the payment of a judgment against the county, and it is made his plain and imperative duty by statute to pay over the money in satisfaction of the judgment, the writ will go to compel the payment. Nor in such a case, does the fact that the judgment was rendered in the federal courts, deprive the state courts of their jurisdiction to enforce the payment.[3] Nor is it any objection to granting relief in this class of cases, that, pending the proceedings at law which resulted in the judgment against the municipal corporation, it was, by legislative enactment, changed from a town to a city, since the municipality remains the same, notwithstanding the change in its machinery, and its obligations may still be enforced against the new body corporate.[4] And the relief will be granted, although the judgment was recovered against individual defendants jointly with the municipal corporation, since the judgment creditor can not be compelled to resort to the individual defendants for satisfaction of his judgment.[5]

[1] City of Olney v. Harvey, 50 Ill. 453; People v. City of Cairo, 50 Ill. 154; Marathon v. Oregon, 8 Mich. 372; Brown v. Crego, 32 Iowa, 498; Duncan v. Mayor of Louisville, 8 Bush, 98; City of Chicago v. Sansum, 87 Ill. 182; Rice v. Walker, 44 Iowa, 458; Webb v. Commissioners, 70 N. C. 307. See also Uzzle v. Commissioners, 70 N. C. 564; McLendon v. Commissioners, 71 N. C. 38; Commissioners of Craven Co. v. Commissioners of Pamlico Co. 73 N. C. 298; Leach v. Commissioners, 84 N. C. 829; City Council v. Hickman, 57 Ala. 338. As to the right to mandamus in this class of cases under the statutes of Missouri, see State v. Slavens, 75 Mo. 508.

[2] Marathon v. Oregon, 8 Mich. 372.

[3] Brown v. Crego, 32 Iowa, 498.

[4] City of Olney v. Harvey, 50 Ill. 453.

[5] Palmer v. Stacy, 44 Iowa, 340.

§ 366. In conformity with the doctrine as stated in the preceding section, it is held that when the mayor of a city is duly authorized and directed by acts of legislature and city ordinances in conformity therewith, to condemn certain property for wharf purposes, and is required to issue bonds of the city in payment for the land thus condemned, mandamus will go to compel the mayor to issue bonds and to raise the necessary funds in payment of the judgment of condemnation. The ground upon which the courts proceed in such a case, is, that an officer of the corporation has undertaken to set at naught the corporate will, and mandamus affords the only remedy. And since the city itself would be entitled to the writ against an officer who had disregarded his duty and set the corporate will at defiance, with equal propriety may the real parties in interest avail themselves of the same remedy.[1]

§ 367. Mandamus is the appropriate remedy to compel a county treasurer to pay over to a town treasurer public funds belonging to the town, to the custody of which its treasurer is entitled.[2] And in such case, on appeal from the judgment of an inferior court awarding the peremp- * 259 tory mandamus, if the appellate tribunal is satisfied that the relator is then entitled to the writ, it may confirm the judgment of the court below, regardless of whether such judgment was correct at the time it was rendered.[3]

§ 367 *a*. While mandamus is freely granted to compel the payment of municipal obligations which have been duly allowed by the proper authority, yet, since the granting of the writ rests in the sound discretion of the court, it is a sufficient ground for refusing relief that the relator has been guilty of unreasonable delay in the assertion of his rights.[4] So if a well-founded doubt exists, either as to the right of

[1] Duncan *v.* Mayor of Louisville, 8 Bush, 98.

[2] State *v.* Hoeflinger, 31 Wis. 257.

[3] State *v.* Hoeflinger, 31 Wis. 257.

[4] State *v.* Earle, 42 N. J. L. 94.

the applicant to receive the money, or as to the duty of the officer to pay it the court will decline to interfere.[1]

§ 367 *b*. Where under the laws of a state the officers of a municipal corporation hold their offices until their successors are elected and qualified, and such officers resign for the purpose of avoiding the auditing and payment of judgments against the municipality, such resignation will not be a bar to mandamus to compel them to audit the judgments, their successors not having been elected.[2] And a judgment creditor of a municipal corporation who has obtained a peremptory mandamus for the payment of his judgment may, if the writ is not obeyed, have an alias peremptory writ to enforce payment, the writ being in such case regarded as in the nature of an execution for the enforcement of the judgment.[3]

III. Municipal Taxation, and Herein of Municipal-Aid Subscriptions and Bonds.

§ 368. Important distinction.
369. Specific duty of levying tax may be enforced by mandamus.
369 *a*. The general doctrine stated.
370. The rule applied to taxation for public improvements.
371. Writ only granted where private rights have intervened.
371 *a*. Power and duty must be clear; debt must be liquidated.
371 *b*. Writ should conform to law of the state.
372. Pendency of proceedings in chancery no bar to mandamus.
373. Taxes in payment of bounties to volunteers.
374. Taxation for school purposes.
375. Issuing tax warrants by supervisors; re-payment of taxes improperly levied.
376. Damages in removal of county seat.
377. Taxation in payment of judgment against municipality.
377 *a*. Ancillary jurisdiction of federal courts.
377 *b*. Demand and refusal when unnecessary.

[1] People *v*. Johnson, 100 Ill. 537.
[2] United States *v*. Badger, 6 Biss. 304.
[3] Fry *v*. Commissioners, 82 N. C. 308.

378. Judgment against school district.
379. Duty of levying the tax a continuing one; successors in office; resignation; demand; want of funds.
380. Writ lies from state courts although judgment was recovered in federal courts; validity of bonds settled by judgment.
381. The jurisdiction cautiously exercised.
382. Municipal railway-aid bonds; mandamus lies to compel levy of tax in payment of interest; conditions requisite.
383. Title to the bonds; averments necessary; sale below par value; remedy in equity.
384. Preliminary proceedings presumed regular.
385. Writ refused when bonds are invalid for want of assent of taxpayers; right must be clear.
386. Not granted when it would be nugatory.
387. Particular method of taxation for particular purpose; assessment of subscription by county courts.
388. Partial compliance with duty insufficient.
389. Mandamus granted to compel municipal subscription in aid of railway.
389 *a*. Effect of injunction as between state and federal court.
389 *b*. Compliance with conditions precedent required; unconstitutional law; fraudulent action of municipal authorities.
390. Actual contract relation necessary between municipality and railway; vote of electors insufficient.
391. Railroad must not interpose unreasonable conditions.
392. When jurisdiction exercised by federal courts.
393. Mandamus granted for levy of tax in payment of judgment upon municipal-aid bonds.
394. The jurisdiction exercised in the federal tribunals.
395. Effect of injunction from state courts; effect of subsequent adverse decisions or legislation by state.
396. Corporation concluded by judgment.
397. When statute construed as imperative; return should disclose facts concerning levy.
398. Mandamus to compel apportionment.
399. Want of capacity in corporation.
400. Surrender of illegal municipal bonds.

§ 368. Questions of much nicety have frequently arisen in determining how far the courts may, by the * 260 extraordinary aid of a mandamus, control the taxing power of municipal bodies and compel the levying of taxes for general or specific purposes, and the extent to which the interference may be carried without encroaching upon the

element of sovereignty which is a necessary incident to the exercise of the taxing power. And in the discussion of these questions, the distinction so often adverted to in these pages between duties of a mandatory or ministerial nature, and those which are accompanied by the exercise of judgment and discretion, will be found to solve most of the difficulties with which the subject has been surrounded through a failure to recognize such distinction.

§ 369. The first general rule to be considered in an examination of the topic under discussion is, that when a specific duty is imposed by law upon a municipal corporation of levying a particular tax for some purpose of public utility, and the duty is so plain and imperative as to admit of no element of discretion in its exercise, mandamus is the appropriate and indeed the only adequate remedy for a refusal on the part of the corporate authorities to perform this duty.[1] A * 261 distinction has been taken in the application of the rule, between cases where the duty devolving upon the municipal authorities is merely a general duty of providing for the payment of all indebtedness against the municipality, and cases where a special duty is made obligatory upon the corporate authorities to levy and collect a tax for a par-

[1] State v. City of Davenport, 12 Iowa, 335; State v. City of Milwaukee, 25 Wis. 122; State v. Smith, 11 Wis. 65; Watts v. Police Jury of Carroll, 11 La. An. 141; State v. City of New Orleans, 34 La. An. 477; Tarver v. Commissioner's Court, 17 Ala. 527; Lee County v. The State, 36 Ark. 276; People v. Supervisors of Columbia Co. 10 Wend. 363; People v. Bennett, 54 Barb. 480; People v. Supervisors of Chenango, 8 N. Y. 317; People v. Supervisors of Otsego, 53 Barb. 564; People v. Supervisors of Herkimer Co. 56 Barb. 452; Wilkinson v. Cheatham, 43 Geo. 258; Trustees v. Dillon, 16 Ohio St. 38; State v. Harris, 17 Ohio St. 608; Morgan v. Commonwealth, 55 Pa. St. 456; Rodman v. Justices of Larue Co. 3 Bush, 144; Pegram v. Commissioners of Cleaveland Co. 64 N. C. 557; Lutterloh v. Commissioners of Cumberland Co. 65 N. C. 403; Shoolbred v. Corporation of Charleston, 2 Bay, 63; Von Hoffman v. City of Quincy, 4 Wal. 535; Supervisors v. United States, Ib. 435; City of Galena v. Amy, 5 Wal. 705; Butz v. City of Muscatine, 8 Wal. 575; Mayor v. Lord, 9 Wal. 409. See also Hosier v. Higgins Township Board, 45 Mich. 340.

ticular purpose, or to meet an obligation created by a special law, and it has been held in the former class of cases that mandamus would not lie, but that in the latter the courts might freely interpose. And if the duty is thus specifically imposed, it will not be performed merely by making a levy and providing generally for the collection of the tax, but it should be specifically performed and the tax should be set apart for the payment of the particular obligation or indebtedness in question. But it is a sufficient return to the writ by the corporate officers to whom it is directed, to show that they have not neglected or refused to provide for the payment of the obligation whose enforcement is sought, and such a return is not demurrable.[1]

§ 369 *a*. The jurisdiction in this class of cases is frequently invoked to enforce the payment of demands against municipal bodies, which have been audited and fixed by the proper authorities. And the rule is well established that when a claim or demand has been duly allowed by the proper municipal authorities the officers whose duty it is to levy a tax for the payment of such demand may be required by mandamus to perform this duty.[2] So the writ will go to a board of municipal officers to apply to the payment of municipal bonds, money which has been levied for that purpose, and also to levy a tax for the payment of the balance of such bonds after the money applicable thereto is exhausted.[3]

§ 370. Frequent instances of the application of the rule have occurred in cases of taxation for municipal improvements, such as the erection of public buildings, the construction of harbors and the like. And where the duty is obligatory upon certain municipal officers of levying and collecting taxes for the erection of public buildings, or other improvements, this duty may be enforced by mandamus, there being

[1] State *v.* City of Davenport, 12 Iowa, 335.

[2] People *v.* Supervisors of Livingston Co. 68 N. Y. 114; State *v.* Buffalo Co. 6 Neb. 454; Klein *v.* Supervisors, 54 Miss. 254.

[3] State *v.* Board of Education, 27 Ohio St. 96.

no other legal remedy.[1] So where a city is authorized by legislative enactment to build a harbor and to issue its bonds for that purpose, and to raise money by taxation in
* 262 payment of the principal and interest of the bonds, upon failure of the city to perform this duty, a contractor who has completed the work and obtained judgment for the amount due for his services, is entitled to the writ to compel the city authorities to levy and collect a tax in payment of his judgment.[2] And where it is made by act of legislature the duty of city authorities to levy an assessment to pay for buildings torn down in the opening of a street, the duty, being absolute and specific, may be enforced by mandamus.[3] So the municipal authorities of a city may be required by mandamus to assess and collect a tax sufficient to pay the appraised value of lands taken by the city for public purposes under the right of eminent domain.[4]

§ 371. But in all cases of this nature, it is essential to the exercise of the jurisdiction that private rights should have intervened requiring the protection of the courts.[5] And when the statute providing for the levy of the tax is merely permissive, as in the case of an act of legislature authorizing but not requiring county commissioners to levy a tax for the construction of a road, no action having been taken under the statute and no private rights having intervened the writ will not go.[6] So when no private rights have as yet been affected by the proceedings, a mere individual tax-payer, who has no other interest than the public generally, is not entitled to the writ to compel the levying of a tax for an amount found necessary by commissioners of highways for

[1] Tarver v. Commissioner's Court, 17 Ala. 527; Watts v. Police Jury of Carroll, 11 La. An. 141; Commonwealth v. Councils of Pittsburgh, 88 Pa. St. 66.

[2] State v. City of Milwaukee, 25 Wis. 122.

[3] Shoolbred v. Corporation of Charleston, 2 Bay, 63.

[4] People v. Common Council of Syracuse, 78 N. Y. 56.

[5] Rollersville & Portage Turnpike v. Commissioners of Sandusky Co. 1 Ohio St. 149; People v. Supervisors of Vermillion, 47 Ill. 259.

[6] Rollersville & Portage Turn-

the construction of a bridge.[1] And the rule in no manner conflicts with the discretion of municipal authorities as to the construction of a work of public improvement which is not made their imperative duty, but is merely permissive upon them, and in such case they will be left to exercise their discretion in their own way and upon their own responsibility.[2]

§ 371 *a*. It is important to be borne in mind that the jurisdiction by mandamus to set in motion the taxing power of municipal corporations is exercised only in cases where the municipality or its officers are clearly authorized by law to levy the tax whose enforcement is sought. If, therefore, the officers against whom the writ is sought have no power or authority to levy the tax in question the courts will decline to interfere by mandamus.[3] Nor will the writ go to a municipal corporation to levy a tax in excess of the amount authorized by law for the payment of a judgment against the corporation.[4] It must also appear that it is the clear duty of the officers against whom the writ is sought to levy the tax, before the courts will interpose by mandamus.[5] And the writ will not go to compel the levy of a tax for the payment of an indebtedness due from a municipal corporation, when the amount of such indebtedness is unliquidated and uncertain.[6]

§ 371 *b*. In granting relief by mandamus to enforce the levy of a tax for the payment of demands against a municipal corporation, the judgment or order of the court should

pike *v*. Commissioners of Sandusky Co. 1 Ohio St. 149.

[1] People *v*. Supervisors of Vermillion, 47 Ill. 259.

[2] Rollersville & Portage Turnpike *v*. Commissioners of Sandusky Co. 1 Ohio St. 149.

[3] Polk *v*. Winett, 37 Iowa, 34; State *v*. Town of Guttenberg, 39 N. J. L. 660; State *v*. City of Shreveport, 29 La. An. 658; State *v*. Town of Maysville, 12 S. C. 76; United States *v*. County of Macon, 99 U. S. 582; State *v*. Fournet, 30 La. An. 1103.

[4] United States *v*. County of Macon, 99 U. S. 582.

[5] C. D. & M. R. Co. *v*. Olmstead, 46 Iowa, 316.

[6] State Board of Education *v*. West Point, 50 Miss. 638.

be so framed as not to contravene the provisions of the law of the state with reference to the time and manner of levying and collecting the tax. And the municipal officers can not, in such cases, be required to do any acts which are not authorized by the law of the state.[1] Nor will the writ go to compel county officers to levy a special tax for the payment of a demand against a county at a time or in a manner different from that prescribed by law for the levy and collection of general taxes.[2]

§ 372. While it is generally true that the pendency of proceedings in chancery involving the same subject-matter, in a court which is fully empowered to administer * 263 relief, is a bar to proceedings in mandamus, yet if it is apparent that the questions involved can not be appropriately or finally determined in the suit in chancery, the aid of a mandamus may be granted, notwithstanding the pendency of such suit. Thus, where commissioners of public parks seek by mandamus to compel a county clerk to receive their estimate of expenses necessary for park improvements, and to include such estimate in the warrants for the collection of the taxes, as provided by law, the writ may be granted, notwithstanding the pendency of a suit in chancery wherein a property holder seeks to enjoin the clerk and commissioners from doing the act whose performance is sought by mandamus. In such case, it is obvious that full and complete justice can not be done to all parties by the proceedings in chancery, since they are no bar to another action by another party against the same defendants for the same subject-matter, and hence the propriety of interfering by mandamus.[3]

§ 373. The duty of levying municipal taxes in payment of bounties to volunteers in the military service, affords a proper subject for the exercise of that branch of the jurisdiction under discussion. And where a local board of munic-

[1] Warren Co. v. Klein, 51 Miss. 807.

[2] State v. Kennington, 10 Rich. N. S. 299.

[3] People v. Salomon, 51 Ill. 55.

ipal authorities is entrusted by law with full power to contract loans in payment of bounties to soldiers, and under such authority has incurred a debt for the payment of such bounties, mandamus will lie to assess the necessary tax in payment of the indebtedness, and the writ may go to the successors in office of those who incurred the obligation.[1] So a county treasurer may be compelled by mandamus to pay over to the proper authorities of a town, the amount of a tax levied for the payment of bounties to volunteers, the tax having been held constitutional and valid.[2] And in determining whether a particular system of paying such bounties has been adopted in their county, county commissioners are held to act in a ministerial rather than a judicial capacity. It is, therefore, no sufficient return to the alternative writ commanding such commissioners to * 264 levy the tax, that after investigation they are unable to conclude that the system of paying bounties specified in the statute has been adopted in their county, since, if the facts exist making the statute applicable to their county, the commissioners are bound to ascertain the facts correctly and to perform the duty enjoined by the statute.[3] But in no event will the writ go to compel the levying of such a tax under a statute held to be void.[4]

§ 374. Relief by mandamus is also granted to compel municipal authorities to raise by taxation the necessary funds for the support of public schools. And the writ will lie to a board of village trustees, requiring them to collect a tax for school purposes, when this duty is made obligatory upon them by a plain and imperative statute.[5] So the common council of a city may be compelled by mandamus to comply with the duty imposed by their charter of raising by taxation the necessary funds for educational purposes in the city, the

[1] Morgan v. The Commonwealth, 55 Pa. St. 456.

[2] Trustees v. Dillon, 16 Ohio St. 88.

[3] State v. Harris, 17 Ohio St. 608.

[4] State v. Tappan, 29 Wis. 664.

[5] People v. Bennett, 54 Barb. 490.

amount having been designated and fixed by the proper authority.[1] And when the duty is clearly incumbent by law upon the collectors of taxes in the different wards of a city, to pay over to the superintendent of schools, out of the first moneys collected by them, such sums of money as are from time to time directed to be raised for public school purposes, mandamus lies upon a refusal to perform the duty.[2] So the writ will go to require a board of school directors to levy a tax for building a school house, the electors of the school district having voted to erect the house.[3]

§ 375. When a board of supervisors have neglected to issue warrants for the collection of a tax at their regular meeting at the time required, the writ will go to compel them to meet and issue the warrants.[4] So, when a plain and imperative statute makes it the duty of a board of supervisors to determine the amounts of taxes which have been improperly assessed against citizens of the county and to cause such taxes to be repaid, this duty may be enforced by mandamus.[5] And when a board of supervisors are required by law to hear and determine applications for the recovery of taxes which have been illegally imposed, they may be required by mandamus to act upon an application of this nature.[6]

§ 376. When the removal of a county seat is * 265 authorized and directed by a statute, which also provides a mode for ascertaining the amount of damages incurred by such removal, mandamus will lie to the proper officer of the county to levy a tax for the payment of damages sustained by the removal, the amounts due having been definitely ascertained in the mode provided by the statute.[7]

[1] State v. Smith, 11 Wis. 65.

[2] State v. Hammell, 2 Vroom, 446.

[3] Cooper v. Nelson, 38 Iowa, 440.

[4] People v. Supervisors of Chenango, 8 N. Y. 317.

[5] People v. Supervisors of Otsego, 53 Barb. 564, 51 N. Y. 401; People v. Supervisors of Herkimer Co. 56 Barb. 452; People v. Supervisors of Ulster Co. 65 N. Y. 300.

[6] People v. Supervisors of Essex Co. 70 N. Y. 228.

[7] Wilkinson v. Cheatham, 43 Geo. 258.

§ 377. The enforcement of judgments against municipal corporations affords frequent occasion for invoking the extraordinary aid of the courts by mandamus. Here, again, we are met by the same distinction already noticed between the enforcement of duties merely ministerial in their nature, and those involving the exercise of certain discretion and judgment. And whenever the duty of levying a tax to satisfy a judgment against a municipal corporation, is plainly and specifically imposed by law upon the corporate authorities, or the ordinary remedy by execution is unavailing, and it is the plain and unmistakable duty of the corporate officers vested with the taxing power, to exercise that power for the purpose of satisfying the judgment, mandamus will go to compel the levying and collecting of the necessary tax.[1] When, therefore, a city is required by its charter, whenever judgment is had against it, to levy and collect the amount of the judgment like other charges against the city, the writ will go to compel the city authorities to perform this duty.[2] So, when a creditor has obtained judgment against a city which can only be satisfied by the levy of a par- * 266

[1] State *v.* City of Madison, 15 Wis. 30; State *v.* Supervisors of Beloit, 20 Wis. 79; State *v.* Common Council of Milwaukee, 20 Wis. 91; State *v.* City Council of Racine, 22 Wis. 258; Gorgas *v.* Blackburn, 14 Ohio, 252; Coy *v.* City Council, 17 Iowa, 1; Frank *v.* San Francisco, 21 Cal. 668; Gooch *v.* Gregory, 65 N. C. 142; Lutterloh *v.* Commissioners of Cumberland Co. 65 N. C. 403; Supervisors *v.* United States, 4 Wal. 435; City of Galena *v.* Amy, 5 Wal. 705; Benbow *v.* Iowa City, 7 Wal. 313; United States *v.* City of Galena, 10 Biss. 263; United States *v.* Town of Brooklyn, 10 Biss. 466; United States *v.* Treasurer of Muscatine Co. 2 Abb. U. S. 53; S. C. *sub nom.* Lansing *v.* County Treasurer, 1 Dill. 522; Welch *v.* Ste. Genevieve, Ib. 130. And see Butz *v.* City of Muscatine, 8 Wal. 575; Mayor *v.* Lord, 9 Wal. 409; Britton *v.* Platte City, 2 Dill. 1; Boynton *v.* District Township of Newton, 34 Iowa, 510; Worthington *v.* Hulton, 13 L. T. R. N. S. 463; United States *v.* Buchanan Co. 5 Dill. 285; United States *v.* Jefferson Co. 5 Dill. 310; Wisdom *v.* City of Memphis, 2 Flippin, 285; State *v.* Assessors of Rahway, 43 N. J. L. 338; Stevenson *v.* District Township, 35 Iowa, 462. See also United States *v.* Vernon Co. 3 Dill. 281; Fisher *v.* Mayor, 17 West Va. 628.

[2] State *v.* City of Madison, 15 Wis. 30.

ticular rate or tax for a given year, the duty thereby devolves upon the municipal authorities of levying such rate, not exceeding the maximum within their powers, as will pay off the judgment. Such duty, it is held, results from the plain moral as well as legal obligation on the part of the city to pay its debts, and no discretion can rightfully be claimed as to its performance by the city officials. It follows, therefore, that mandamus will lie for the enforcement of the duty.[1] And when it is made by law the plain duty of a county board of supervisors to provide for the payment of all debts against the county, they being vested with no discretion in the matter, if they refuse to make provision for the payment of a judgment debt, they may be directed by mandamus, either to appropriate the necessary amount from the revenues of the county, or to provide for the payment by taxation.[2] So, when a judgment is obtained against a town in its corporate capacity, and it is averred in the alternative writ that the corporation has no property with which to satisfy an execution, the writ will go to compel the officers of the town to levy and collect a tax in satisfaction of the judgment.[3] And the fact that no execution can issue against a county, which represents in some sense the sovereignty of the state, has been held sufficient warrant for sustaining a mandamus to county authorities, directing the levy of a tax in payment of a judgment against the county.[4] Nor, in this class of cases,

[1] Coy *v.* City Council, 17 Iowa, 1.

[2] Frank *v.* San Francisco, 21 Cal. 668.

[3] Gorgas *v.* Blackburn, 14 Ohio, 252.

[4] Lutterloh *v.* Commissioners of Cumberland Co. 65 N. C. 403. But in Tennessee, the courts refuse to interfere by mandamus to compel the levying of a tax by county authorities in payment of claims against the county which have been allowed, on the broad ground that the taxing power is in its nature a legislative function, with which the judicial department can not properly interfere, even though the party aggrieved has no other remedy. The power of the county authorities to levy a tax is held to be a part of the fiscal or taxing power of the state, delegated to the several counties, and the officers to whom the duty is entrusted, within their limited sphere have a discretion to exercise of the same nature as that

is it necessary that a previous demand should be made upon the municipal authorities for payment of the judgment, when they have long delayed and neglected payment, and when it is obvious that they do not intend to pay.[1]

§ 377 *a*. Mandamus will lie in the circuit courts of the United States, in aid of a judgment recovered in those courts against a municipal corporation, to command the corporate authorities to levy a tax with which to pay the judgment, even though the municipal officers have been enjoined by the state courts from making such levy. In such a case, the writ of mandamus is ancillary to the jurisdiction of the federal court which had first attached, the writ being in the nature of an execution to enforce a judgment already obtained.[2]

§ 377 *b*. When the duty of municipal officers to levy and collect a tax for the payment of a judgment against the corporation is plain and imperative, it affords no excuse for their inaction that a demand was not made upon them for the performance of this duty before seeking the extraordinary aid of the courts. The relief will therefore be granted in such a case, although no previous demand was made upon the officers to levy the tax.[3] Nor does the want of a demand and refusal afford sufficient objection to granting the relief when the board of municipal officers, against whom the writ is sought, have declared by a resolution that they will not levy the tax unless the relator submits to certain illegal conditions.[4]

§ 378. The jurisdiction in the class of cases under consideration has been extended to officers of school * 267 districts, on whom is imposed the duty of levying

of the legislature itself. Justices of Cannon Co. *v.* Hoodenpyle, 7 Humph. 145.

[1] United States *v.* Town of Brooklyn, 10 Biss. 466.

[2] Riggs *v.* Johnson Co. 6 Wal. 166. See also United States *v.* Silverman, 4 Dill. 224; United States *v.* Supervisors of Lee Co. 2 Biss. 77, 1 Chicago Legal News, 121.

[3] State *v.* City Council of Racine, 22 Wis. 258; Fisher *v.* City of Charleston, 17 West Va. 595.

[4] People *v.* Supervisors of Livingston Co. 68 N. Y. 114.

a tax for the payment of judgments recovered against the district, and mandamus lies to compel the performance of this duty, where no property of the municipality can be found subject to levy under execution. The duty of levying a tax under such circumstances becomes an imperative obligation, and since the court can not act upon the individual electors of the school district to compel them to vote the tax, it must necessarily proceed by mandamus against the board of directors, who are the agents and representatives of the district, to compel them to perform the duty.[1]

§ 379. The cases already cited afford sufficient illustration of the doctrine under discussion and of its application in practice. It remains, however, to be observed, that the duty of levying a municipal tax in satisfaction of a judgment against the corporation, is treated as a continuing duty, and it does not terminate with the levying of a single tax which is collected only in part, but ends only when the whole amount is collected and the judgment paid. Hence it affords no excuse for a partial performance of the duty that the municipal authorities have levied and collected a portion of the tax, but that certain tax-payers have neglected to pay their assessments.[2] And since the duty is a continuing one, the retirement from office of a portion of the municipal authorities affords no bar to relief by mandamus, and the duty may be enforced against their successors in office.[3] Nor can the corporate officers absolve themselves from the responsibility of levying the tax by a fraudulent resignation of their offices.[4] And when the tax levied for the payment of a judgment is insufficient, the court may, in the same proceeding, grant

[1] Boynton v. District Township of Newton, 34 Iowa, 510; Stevenson v. District Township, 35 Iowa, 462.

[2] State v. City of Madison, 15 Wis. 30. And see Benbow v. Iowa City, 7 Wal. 313.

[3] State v. City of Madison, 15 Wis. 30. And see as to the right to mandamus to compel a second levy of a tax to pay a judgment against a municipal corporation, Duperier v. Police Jury, 31 La. An. 709.

[4] Gorgas v. Blackburn, 14 Ohio, 252.

another mandamus, directing the levy of another tax.[1] Nor is it a sufficient return to a mandamus command- * 268 ing the levying of a municipal tax in payment of a corporate indebtedness, that there is no money in the treasury, since the very object of the writ is to procure money.[2]

§ 380. Mandamus will lie from the state courts to compel municipal authorities to exercise their taxing power for the satisfaction of a judgment, even though the judgment was obtained against the municipality in the federal courts.[3] And upon application for the writ to command municipal authorities to levy a tax in payment of judgments against the town, the validity of the bonds on which the judgments were obtained can not be inquired into or called in question, since this is settled by the judgment itself and the town is estopped by that decision.[4] And since mandamus to compel the levy of a tax for the payment of a judgment recovered upon municipal bonds is in the nature of an execution to enforce such judgment, defenses which relate to the validity of the original obligation can not be entertained upon the application for a mandamus, the obligation having merged in the judgment. In such a proceeding, if it appears that the municipal corporation was duly authorized to subscribe to the stock of a railway company and to issue its bonds for that purpose, the power of taxation for the payment of the obligations thus incurred will be conclusively presumed, unless the law conferring the authority, or some general law in force at the time, clearly manifests a contrary intention.[5]

§ 381. Although, as we have seen in the preceding sections, the jurisdiction by mandamus to set in motion the taxing power of municipalities is well established, it is to

[1] Palmer *v.* Jones, 49 Iowa, 405.

[2] Huntington *v.* Smith, 25 Ind. 486.

[3] State *v.* Supervisors of Beloit, 20 Wis. 79. And see State *v.* City of Madison, 15 Wis. 30.

[4] State *v.* Supervisors of Beloit, 20 Wis. 79; Mayor *v.* Lord, 9 Wal. 409.

[5] Ralls County Court *v.* United States, 105 U. S. 733. See also Wolff *v.* New Orleans, 103 U. S. 358.

be exercised with much caution, and the interference will not be granted for trivial causes. And where the judgment which it is sought to enforce in this manner has not been in existence a sufficient length of time to satisfy the court, in the absence of other proof, that the municipal authorities have any disposition to withhold payment unreasonably, the return averring that a part of the burden properly belongs to another county, and that respondents are and always have been ready and willing to pay the relator that portion of the judgment rightfully due from their county, the peremptory writ will be refused.[1]

§ 382. We come next to a consideration of the principles upon which the taxing power of municipal corporations may be set in motion, to meet their obligations incurred by municipal subscriptions in aid of railway and other kindred enterprises of a quasi-public nature. And it is to be * 269 premised that where municipal officers have, by authority of law, pledged the faith of the municipality in aid of such enterprises, and have issued municipal bonds in payment of their subscriptions to the capital stock, the duty of levying a tax to meet such obligations is merely a ministerial duty, unattended with the exercise of any special discretion. And the rule may now be regarded as too firmly established to admit of doubt, that where municipal corporations are authorized by law to subscribe to the stock of railway companies, and to issue their bonds in payment of such subscriptions, and are also required to levy a tax for payment of the interest on bonds thus issued, or for payment of the principal, mandamus will lie in behalf of the bond-holders, to compel the corporate authorities to levy the necessary tax with which to make such payment.[2] The

[1] Tillson *v.* Commissioners of Putnam Co. 19 Ohio, 415.

[2] Maddox *v.* Graham, 2 Met. Ky. 56; Shelby Co. Court *v.* Cumberland & Ohio R. Co. 8 Bush. 209; Commissioners of Knox Co. *v.* Aspinwall, 24 How. 376; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; Commonwealth *v.* Commissioners of Allegheny Co. 37 Pa St.

conditions requisite to the exercise of the jurisdiction in this class of cases are, a clear, legal right in the owners * 270 of the bonds, coupled with a corresponding duty on the part of the municipal authorities to provide the means of payment, and the want of any other adequate and specific legal remedy. These conditions co-existing, the municipal authorities who are charged with the duty of providing for the payment of the interest upon the securities issued by the corporation, may be required by mandamus to perform their plain and imperative duty.[1] Nor is it necessary, in this class of cases, to show any express refusal in terms, upon the part of the corporate officers, to lay the foundation for the writ, it being sufficient if it is apparent from their conduct that they do not intend to perform the act required,[2] especially when it is averred in the return that the respondents are resisting the payment of the railway obligations. * 271 And the fact that actions at law have been brought against the municipality upon the unpaid coupons, affords no objection to the issuing of the writ, when such actions have been dismissed before judgment in mandamus.[3] Nor is it a sufficient return to the alternative writ in this class of cases, that there are no funds in the hands of the officers with which to meet the interest upon the municipal obligations, it being their duty to levy a tax to procure funds.[4] And when the necessary funds have been collected by taxation for the pay-

277; Same v. Same, 32 Pa. St. 218; State v. Commissioners of Clinton Co. 6 Ohio St. 280; Pegram v. Commissioners of Cleaveland Co. 64 N. C. 557; Commissioners of Columbia Co. v. King, 13 Fla. 451; Robinson v. Supervisors of Butte, 43 Cal. 353; Commissioners Court v. Rather, 48 Ala. 433; Commissioners of Sedgwick Co. v. Bailey, 11 Kan. 631; State v. Anderson Co. 8 Baxter, 249; Flagg v. Mayor of Palmyra, 33 Mo. 440. And see People v. Mead, 24 N. Y. 114.

[1] Commonwealth v. Pittsburgh, 34 Pa. St. 496; Maddox v. Graham, 2 Met. Ky. 56; Commonwealth v. Commissioners of Allegheny Co. 32 Pa. St. 218.

[2] Maddox v. Graham, 2 Met. Ky. 56; Commonwealth v. Pittsburgh, 34 Pa. St. 496.

[3] Maddox v. Graham, 2 Met. Ky. 56.

[4] Pegram v. Commissioners of Cleaveland Co. 64 N. C. 557.

ment of interest upon railway-aid bonds, payment may be enforced by mandamus.[1]

§ 383. It is not essential to the exercise of the jurisdiction in this class of cases, that the relator's title to the bonds should be set forth in detail, and it is a sufficient averment of his title to allege that he purchased the bonds, without giving the consideration for the purchase, or the method of the transfer.[2] Nor is it necessary to allege in the alternative writ when the principal of the bonds becomes due and payable, nor the rate of interest which they bear, nor the time and place of payment of interest.[3] And the relief will be granted, notwithstanding the bonds have been disposed of below their par value, in violation of law. Nor does the existence of a remedy in equity constitute a sufficient objection to granting the aid of a mandamus in this class of cases.[4]

§ 384. While in this class of cases the courts will hold the bond-holder to a knowledge of the law authorizing the issue of the bonds, yet they will not hold him bound to inquire into the regularity of the municipal election voting the railway-aid subscription, nor will they hold him bound to inquire as to the qualifications of the voters, nor as to other details affecting the regularity of the bonds.[5] The issuing of the bonds authorizes the presumption in favor of a *bona fide* holder, that all such pre-requisites have been complied with, in the time, form and manner required * 272 by law, and objections upon the ground of irregularities in such preliminary proceedings will not avail upon the application for mandamus.[6] Nor is it necessary that the

[1] People *v.* Brown, 55 N. Y. 180; State *v.* Craig, 69 Mo. 565.

[2] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496.

[3] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496. And see Commonwealth *v.* Commissioners of Allegheny Co. 37 Pa. St. 277.

[4] Commonwealth *v.* Commissioners of Allegheny Co. 32 Pa. St. 218.

[5] Flagg *v.* Mayor of Palmyra, 33 Mo. 440. And see Mayor *v.* Lord, 9 Wal. 409; State *v.* Anderson, 8 Baxter, 249.

[6] Flagg *v.* Mayor of Palmyra, 33 Mo. 440.

bond-holder should first resort to suit to fix the amount of interest due upon his bonds, since this is merely a question of mathematical calculation, and may be as well determined by the municipal records as by the judgment of a court.[1]

§ 385. While, however, the courts will not hold the relator to the necessity of an inquiry as to the regularity of the details connected with the issuing of the bonds, or with the previous proceedings, yet it is a sufficient objection to granting relief that the bonds are absolutely invalid. And when it is shown that the necessary assent of the tax-payers of the municipality was not obtained to the issuing of the bonds, as required by the act authorizing their issue, and that the bonds are therefore invalid, the holder is not entitled to the aid of a mandamus.[2] So the writ will not go in a doubtful case, or when the petition does not show a clear, *prima facie* case for the relief.[3] And if the validity of the bonds is disputed the relief may be withheld until the relator has established their validity by an ordinary action at law.[4]

§ 386. The general doctrine being well established that mandamus will not lie in cases where the writ, if granted, would be nugatory, the peremptory writ will be refused where the purpose of the application is to compel county authorities to levy taxes in payment of certain bonds of the county, which are required by law to be paid out of the taxes collected in certain specified localities in the county, when the return of the officers shows that they have no knowledge or means of information sufficient to enable them to assess the tax against the lands, and no means of determining the * 273 particular districts to be assessed according to law, the records supplying such information having been destroyed.[5]

§ 387. Where a particular method of raising money by

[1] Commissioners of Columbia Co. v. King, 13 Fla. 451.

[2] People v. Mead, 36 N. Y. 224.

[3] Springfield & I. S. R. Co. v. County Clerk, 74 Ill. 27.

[4] State v. Mayor of Manitowoc, 52 Wis. 423.

[5] Ackerman v. Desha County, 27 Ark. 457.

municipal taxation for local purposes is provided by law, it would seem that the person entitled to receive the money may have the aid of mandamus to compel its payment, even though a possible remedy may exist by action at law. Thus, where it is provided by statute that the interest upon certain town bonds shall be met by the levying of a tax, and the money thus raised shall be paid to the bond-holders by commissioners designated for that purpose, the writ will go to require such commissioners to make the payment, an action against the town not being regarded as an effective remedy.[1] And where, under an act of legislature, certain county courts are authorized to take and subscribe stock for their counties in an incorporated turnpike company, and are empowered to assess the amount of stock so subscribed upon the real estate within their counties, mandamus is the proper remedy to require such courts to carry out their obligation and to make the necessary assessment in payment of their subscription, no other remedy being adequate to enforce the performance of the duty.[2]

§ 388. A partial compliance with the law creating the obligation on the part of the municipal authorities to levy the tax, will not avail against the exercise of the jurisdiction by mandamus. And when it is made by law the duty of a board of county supervisors to levy and collect each year a tax upon all the taxable property in the county, sufficient for the payment of all the bonds of the county outstanding, and to provide a certain fund for their redemption, if the supervisors have knowingly made an insufficient levy for these purposes, the writ will go to command them to levy a sufficient tax.[3]

§ 389. The propriety of the writ of mandamus, as a means of compelling delinquent municipalities to discharge
* 274 liabilities which they have incurred under stock subscriptions in aid of railways, is thus shown to be fully

[1] People v. Mead, 24 N. Y. 114.
[2] Justices of Clarke v. Paris etc. Turnpike Co. 11 B. Mon. 143.
[3] Robinson v. Supervisors of Butte, 43 Cal. 353.

established.[1] Nor is the interference of the courts for this purpose confined to cases where the bonds or obligations of the municipal corporation have already been issued, but the relief may also be granted to enforce the subscription and to compel the issuing of the municipal securities pledged in aid thereof.[2] Thus, the writ will go to compel a board of county sepervisors to subscribe to the stock of a railway company, when the duty of making such subscription is plainly required by law.[3] But in such case, it is held to be the duty of the railway company to first demand of the supervisors that they make the subscription, and to tender the books of the company and request the subscription.[4] And where the authorities of a municipal corporation, duly authorized by law to subscribe to the stock of a railway company, have made such subscription, with the assent of the majority of the electors of the municipality, as required by law, mandamus is the appropriate remedy to procure the issuing and delivery of the bonds to the railway, in accordance with the subscription. In such case, a clear, legal right is shown on the part of the railway, involving a corresponding official duty on the part of the municipal authorities, for the performance of which mandamus affords the only adequate and specific remedy.[5] So when it is the duty of a town clerk to countersign bonds of the town in aid of a railway company, the duty,

[1] See also Commonwealth *v.* Perkins, 43 Pa. St. 400.

[2] Napa Valley R. Co. *v.* Supervisors of Napa Co. 30 Cal. 435; People *v.* Ohio Grove Town, 51 Ill. 192; *Ex parte* Selma & Gulf R. Co. 45 Ala. 696; Cincinnati etc. R. Co. *v.* Commissioners of Clinton Co. 1 Ohio St. 77; Osage Valley R. Co. *v.* County Court, 53 Mo. 156; Atchison, T. & S. F. R. Co. *v.* Commissioners, 12 Kan. 127; State *v.* Jennings, 48 Wis. 549; See also Mayor of Kokomo *v.* The State, 57 Ind. 152.

[3] Napa Valley R. Co. *v.* Supervisors of Napa Co. 30 Cal. 435.

[4] Oroville & Virginia R. Co *v.* Supervisors of Plumas Co. 37 Cal. 354.

[5] Cincinnati etc. R. Co. *v.* Commissioners of Clinton Co. 1 Ohio St. 77; People *v.* Ohio Grove Town, 51 Ill. 192; *Ex parte* Selma & Gulf R. Co. 45 Ala. 696. But see S. C. 46 Ala. 230.

being a mere ministerial act, may be enforced by mandamus.[1] And in a proceeding for a mandamus to require town officers to deliver bonds to a railway company, to which it is entitled in exchange for its stock under a vote of the electors, the delay of the relator in instituting the proceeding will not of itself prevent the relief, when the town has sustained no prejudice by such delay.[2]

§ 389 *a*. A state court may properly issue a writ of mandamus to compel the delivery by the proper officers of a county to a railway company of bonds issued in aid of a subscription to its capital stock, notwithstanding an injunction has been previously granted in a suit in a federal court against the county officers restraining the issue of the bonds, since the railway company, not being a party to the injunction suit, is not concluded thereby.[3]

§ 389 *b*. It is, however, to be observed, that in cases where mandamus is sought to compel the delivery of municipal-aid bonds, a non-compliance with the preliminary conditions imposed by the law authorizing the subscription will be fatal to the application for relief.[4] Thus, when the law requires as a condition to the issuing of such bonds that the assent of a majority of the tax-payers should be procured, and that the instrument by which such assent is evidenced should be filed and recorded in the county clerk's office, the omission to file and record such assent is sufficient ground for refusing a mandamus to compel the issuing of the bonds to the railway company.[5] Nor will the writ go to compel the delivery of such bonds when there has been no valid election authorizing their issue, or when by a constitutional amendment the authority to create such indebtedness and to

[1] Houston *v.* The People, 55 Ill. 398.

[2] State *v.* Jennings, 48 Wis. 550.

[3] Atchison, T. & S. F. R. Co. *v.* Commissioners of Jefferson Co. 12 Kan. 127.

[4] Essex Co. R. Co. *v.* Town of Lunenburgh, 49 Vt. 143; People *v.* Trustees of Fort Edward, 70 N. Y. 28; People *v.* Cline, 63 Ill. 394.

[5] Essex Co. R. Co. *v.* Town of Lunenburgh, 49 Vt. 143.

issue bonds therefor has been taken away.[1] So the relief will be denied when it is shown that the statute under which the subscription was had is unconstitutional.[2] And it is a good return to the alternative writ to show that the municipal officers who enacted the ordinance authorizing the issue of the bonds were influenced by corrupt means, and by a secret agreement with the railway company made for their individual benefit.[3] And the relief will be denied when it is not shown that the railway company has complied with the conditions upon its part, upon which it is entitled to receive the bonds.[4]

§ 390. A distinction is drawn between cases where the subscription has ripened into a contract with the railway company, and the case of a mere vote of municipal electors authorizing the subscription, but unaccompanied by any act upon the part of the officers or agents of the municipality, whereby a contract relation has been established between the municipal corporation and the railway. * 275 And since the people of a county can not, in their primary capacity, enter into contract relations binding upon the county, but must act through their duly constituted agents or officers, it follows that a mere vote of the people of a county authorizing the subscription, does not of itself constitute a contract with the railway, nor is it a proposition which can ripen into a contract upon performance by the railway of the conditions annexed to the vote. Such a vote, therefore, does not constitute sufficient foundation for a mandamus to compel the county to issue its bonds, or to levy a tax in aid of the subscription, nor will a tender of its stock by the railway, at or before the making of its request upon the corporate authorities to make the subscription, vary the

[1] People *v.* Trustees of Fort Edward, 70 N. Y. 28.

[2] People *v.* Batchellor, 53 N. Y. 128.

[3] State *v.* City of Lake City, 25 Minn. 404.

[4] People *v.* Glann, 70 Ill. 232; People *v.* Town of Waynesville, 88 Ill. 469. See also People *v.* Holden, 91 Ill. 446.

relations of the parties, or afford ground for the relief.[1] In such case, until a contract has been actually consum-
* 276 mated between the officers of the county and the railway, the acts of the former and of the voters of the county are regarded as between themselves, the one as principal and the other as agent. No contract exists with the railway company, and until the money is actually raised, or the stock taken, the principal and agent, that is, the people and their officers, alone have control of the proceedings, and mandamus will not lie.[2] And until the municipality has made a legal and binding agreement to issue its bonds to a railway company, the writ will not go to compel such issue.[3]

§ 391. While it is conceded that mandamus is the proper remedy to enforce a compliance upon the part of municipal authorities, with their subscriptions in aid of railway and other kindred enterprises of a quasi-public nature, and to compel the delivery of municipal-aid bonds which have been regularly voted, when the railway has complied with all the conditions necessary to entitle it to the bonds, the jurisdiction will not be exercised when the demand for the municipal obligations is coupled with unreasonable or illegal conditions. And where a county has subscribed to the stock of a railway company, and the company in tendering its stock and demanding the bonds of the county, couples the tender with conditions which are unwarranted by law, as that the stock, after delivery to the county, shall be immediately delivered back to the railway company for a merely nominal consideration, mandamus will not go in aid of the railway, even though the conditions were in pursuance of an agreement entered into at the time of making the subscription, such an agreement

[1] Union Pacific R. Co. *v.* Commissioners of Davis, 6 Kan. 256; Commissioners of Crawford *v.* Louisville, New Albany & St. Louis Air Line R. Co. 39 Ind. 192.

[2] Commissioners of Crawford *v.* Louisville, New Albany & St. Louis Air Line R. Co. 39 Ind. 192.

[3] State *v.* Town of Highland, 25 Minn. 355. See also State *v.* Town of Roscoe, 25 Minn. 445.

being a fraud *per se*, which the courts will not recognize or enforce by mandamus.[1]

§ 392. As regards the jurisdiction of the circuit courts of the United States, in the class of cases under * 277 consideration, it is to be borne in mind that these courts can only interfere by mandamus in cases where the use of the writ is necessary to the proper exercise of their existing jurisdiction. And while, as we shall presently see, these courts freely interpose the aid of mandamus to compel the payment of judgments upon municipal obligations rendered therein, they will not grant the writ to compel municipal authorities to levy and collect a tax for the payment of interest upon bonds of the municipality, when the claim for interest has not been reduced to judgment in the federal courts. The granting of the writ in such case would be the exercise of an original jurisdiction, from which they are expressly barred, their use of this extraordinary remedy being limited strictly to cases where it is essential to the proper exercise of a jurisdiction already conferred by law.[2]

§ 393. The cases thus far considered in which the extraordinary aid of mandamus has been granted to compel municipal corporations to levy a tax to meet their liabilities upon municipal-aid securities, have been cases where the obligations of the corporation were not yet reduced to judgment. We pass, next, to the consideration of cases where relief is sought after judgment obtained against the municipality, and here we shall find the same principles applicable as before. Indeed, after the municipal securities have been reduced to judgment, the duty of levying a tax to provide means for payment of the judgment would seem to be even stronger than before. And the rule may be regarded as established by an overwhelming weight of authority, that mandamus is the appropriate remedy to compel municipal

[1] County Court of Macoupin *v.* The People, 58 Ill. 191; County Court of Madison *v.* The People, Ib. 456.

[2] Bath County *v.* Amy, 13 Wal. 244, 4 Chicago Legal News, 209.

corporations to comply with their duty of levying and collecting taxes, in payment of judgments obtained upon bonds or other obligations of the municipality, issued by authority of law in aid of railway and other enterprises of a like nature.[1] Indeed, the jurisdiction by mandamus in
* 278 this class of cases may now be regarded as so firmly established, as to oust the jurisdiction of equity over the subject-matter. A bill in equity, therefore, will not lie to subject the taxable property of the municipality to the payment of judgments upon its bonds issued in aid of subscriptions to railways, and the judgment creditor will be left to pursue his remedy by mandamus. And this is true, even though he may have repeatedly invoked the extraordinary aid of a mandamus without avail, since the remedy at law is, in theory at least, adequate and perfect, although the execution of that remedy may have been unjustly delayed by the fraudulent conduct of the municipal authorities, aided by legislative enactments, in resisting the enforcement of the writs of mandamus.[2] And the writ of mandamus, when granted in this class of cases, is regarded as in the nature of an execution for the enforcement of the judgment.[3]

§ 394. The jurisdiction by mandamus in this class
* 279 of cases has been more frequently exercised in the federal than in the state tribunals. And while doubts have been expressed as to the power of the circuit courts of

[1] Commissioners of Knox Co. *v.* Aspinwall, 24 How. 376; Supervisors *v.* United States, 4 Wal. 435; Von Hoffman *v.* City of Quincy, 4 Wal. 535; City of Galena *v.* Amy, 5 Wal. 705; Butz *v.* City of Muscatine, 8 Wal. 575; Mayor *v.* Lord, 9 Wal. 409; Benbow *v.* Iowa City, 7 Wal. 313; United States *v.* City of Sterling, 2 Bissell, 408, 3 Chicago Legal News, 187; United States *v.* Supervisors of Lee County, 2 Bissell, 77, 1 Chicago Legal News, 121; United States *v.* Treasurer of Muscatine Co. 2 Abb. U. S. 53; S.C. *sub nom.* Lansing *v.* County Treasurer, 1 Dill. C. C. 522; Welch *v.* Ste. Genevieve, Ib. 130. And see Walkley *v.* City of Muscatine, 6 Wal. 481.

[2] Rees *v.* City of Watertown, 19 Wal. 107, 6 Chicago Legal News, 221.

[3] Louisiana *v.* United States, 103 U. S. 289; Ralls County Court *v.* United States, 105 U. S. 733.

the United States to issue the writ of mandamus to municipal officers, commanding them to levy a tax in payment of judgments recovered in those courts upon municipal obligations, the right is now clearly established, both upon principle and authority.[1] In such cases it is held that the fourteenth section of the judiciary act of 1789, authorizing the courts of the United States to issue all writs which may be necessary for the exercise of their respective * 280 jurisdictions and agreeable to the principles of the common law, confers sufficient authority upon the circuit courts to warrant their interference by mandamus. The jurisdiction over the subject-matter itself being regarded as plain, and it being necessary to its effective exercise that the circuit courts should compel the corporate authorities to perform the ministerial duty of levying the tax, mandamus is regarded as the only writ within the constitutional powers of these courts adequate to the emergency.[2]

§ 395. Nor is the right of a judgment creditor to the aid of mandamus from the federal courts, in the * 281 class of cases under consideration, affected by an injunction issued from a state court, restraining the municipal authorities from levying the tax, in a suit to which the relator is not a party, since the state tribunals will not be

[1] Commissioners of Knox Co. *v.* Aspinwall, 24 How. 376; United States *v.* Treasurer of Muscatine Co. 2 Abb. U. S. 53; S. C. *sub nom.* Lansing *v.* County Treasurer, 1 Dill. C. C. 522; Welch *v.* Ste. Genevieve, Ib. 130. See Rusch *v.* Supervisors of Des Moines Co. 1 Woolworth, 313.

[2] Commissioners of Knox Co. *v.* Aspinwall, 24 How. 376. See also United States *v.* Supervisors of Lee County, 2 Bissell, 77, 1 Chicago Legal News, 121. And it has been contended that in case of failure or neglect of the municipal authorities to levy and collect the tax, the circuit court of the United States may appoint its own marshal to perform the duty. United States *v.* Treasurer of Muscatine Co. 2 Abb. U. S. 53; S. C. *sub nom.* Lansing *v.* County Treasurer, 1 Dill. C. C. 522. And see Welch *v.* Ste. Genevieve, 1 Dill. C. C. 130. But this doctrine has been denied by Mr. Justice MILLER in Rusch *v.* Supervisors of Des Moines Co. 1 Woolworth, 313, and is completely overthrown in Rees *v.* City of Watertown, 19 Wal. 107, 6 Chicago Legal News, 221, and in Barkley *v.* Levee Commissioners 93 U. S. 258.

allowed thus to paralyze the process of the United States courts, issued in aid of and to give effect to their own judgments.[1] Nor can the rights of the judgment creditor
* 282 against the municipality be taken away or impaired by subsequent judicial decisions of the state courts, or by their construction of state statutes which impair the obligation of the contract. And the Supreme Court of the United States, if satisfied that the judgment creditor was entitled to the aid of a mandamus against the municipality, under the statutes of the state in force at the time of making the contract, will enforce the same remedy, notwithstanding subsequent decisions of the state courts giving a different construction to their statutes. And it is regarded as being as much within the power of the Supreme Court of the United States, under the twenty-fifth section of the judiciary act, to protect the contract rights of the judgment creditor against subsequent judicial decisions of the state, as it would be against subsequent legislation.[2] So the subsequent legislation of the state, after the rights of the judgment creditor have accrued, will not be allowed to deprive him of his right by mandamus to compel the levying of a tax by the municipality in payment of his judgment upon its bonds. Thus, when at the time of issuing the bonds, the laws of the state authorize and require the municipal corporation to collect sufficient taxes to meet its obligations, but after contract rights have accrued and the relator has purchased the bonds, an act of legislature attempts to restrict the power of municipal taxation, so that the corporation will not be able to collect a sufficient amount to pay the judgments upon its bonds, or to restrict the use of mandamus as a remedy for the enforcement of such judgments, such legislation will not be allowed to impair the right of the judgment creditor to relief by mandamus. The state having, in the first instance, authorized the municipal corporation to contract by issuing

[1] Mayor v. Lord, 9 Wal. 409.

[2] Butz v. City of Muscatine, 8 Wal. 575.

its bonds, and to exercise the power of local taxation to the extent necessary to meet such obligations, the power conferred becomes a trust, which can not be annulled by the donor, and neither the state nor the corporation can impair the obligation of the contract. Mandamus will therefore lie to compel the corporate authorities to levy and collect the necessary tax in payment of the judgment, * 283 notwithstanding such subsequent legislation.[1]

§ 396. In applications for mandamus to compel munic-

[1] Von Hoffman *v.* City of Quincy, 4 Wal. 535; Wolff *v.* New Orleans, 103 U. S. 358; Louisiana *v.* Pilsbury, 105 U. S. 278; Assessors of Taxes *v.* The State, 44 N. J. L. 395. In Von Hoffman *v.* City of Quincy, 4 Wal. 535, SWAYNE, J., delivering the opinion of the court, says: "When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. New Jersey *v.* Wilson, 7 Cranch, 166; Dodge *v.* Woolsey, 18 How. 331; Piqua Branch *v.* Knoop, 16 How. 369. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given can not be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor can not annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. People *v.* Bell, 10 Cal. 570; Dominick *v.* Sayre, 3 Sandf. 555. The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right of no practical value, and render the protection of the constitution a shadow and a delusion."

ipal corporations to collect taxes in payment of judgments upon municipal-aid securities, the courts will not permit the correctness of the judgment to be impeached.[1] Nor is it a valid objection to granting the relief that the bonds of the municipality were never sanctioned by the requisite popular vote, the corporation being concluded upon all such questions by the judgment at law, and the courts will not go behind the judgment and, upon proceedings for mandamus, * 284 investigate the sufficiency of the original cause of action.[2]

§ 397. It is not essential to the exercise of the jurisdiction in this class of cases, that the duty of levying the tax should be peremptorily required by statute of the corporate authorities, but it is sufficient that their statutory authority be simply permissive, provided rights have accrued requiring protection by mandamus. Thus, where a board of county officers are empowered by statute to levy and collect a special tax, if deemed advisable by them, for the payment of county debts not otherwise provided for, the words of permission will be construed as peremptory and as imposing an absolute duty upon the officers, whenever public interests or individual rights require such construction, and mandamus will go in such case to compel the county authorities to levy the tax in payment of judgments upon bonds of the county.[3] And in all cases of this nature, it is not a sufficient return to the alternative writ to allege, in the words of the writ, that the tax has been levied, without disclosing the whole act constituting the levy, in order that the court may determine whether a sufficient levy has been made to satisfy the judgment.[4]

§ 398. Where it is made by law the duty of a county board of supervisors to apportion the amount of indebtedness of the county to the state with the other taxes, and to levy

[1] Supervisors v. United States, 4 Wal. 435.

[2] Mayor v. Lord, 9 Wal. 409.

[3] Supervisors v. United States, 4 Wal. 435; City of Galena v. Amy, 5 Wal. 705. And see Walkley v. City of Muscatine, 6 Wal. 481.

[4] Benbow v. Iowa City, 7 Wal. 313.

the same as a portion of the county taxes for that year, and the amount of such indebtedness is properly certified to the board by the proper officer of the state, the legal duty of the board becomes fixed and peremptory, and mandamus will go to compel the making of the apportionment.[1]

§ 399. When a municipal corporation is authorized to subscribe to the capital stock of a private corporation, and the only means provided by law for the payment of its subscription is by issuing its bonds, it is held to be a sufficient return to a mandamus requiring payment of the subscription that the corporate authorities have made diligent effort to effect a sale of the bonds, but without avail. In * 285 such a case, the subscription is held to have been made with reference to the restricted powers of the municipality, and the failure to make the payment is regarded as having originated in a want of capacity known to both parties in the first instance, and subject to which the subscription was made.[2]

§ 400. Where a state treasurer has received, in his official capacity, certain municipal-aid bonds, under a law which is afterwards declared unconstitutional, mandamus will lie in behalf of the municipality to compel the surrender of the bonds, when the treasurer has refused on proper demand to surrender them. The corporation in such case has the clear right to recall its illegal securities, and the duty of the treasurer to surrender them being plain and unmistakable, involving no exercise of official discretion, a proper case is afforded for relief by mandamus.[3]

[1] People *v.* Supervisors of Jackson Co. 24 Mich. 237.

[2] Neuse River Navigation Co. *v.* Commissioners of Newbern, 7 Jones, 275.

[3] People *v.* State Treasurer, 23 Mich. 499; Same *v.* Same, 24 Mich. 468.

IV. Municipal Officers and Elections.

§ 401. Mandamus granted to compel holding of municipal election.
402. Granted to compel admission to municipal office; swearing in.
403. Writ refused where municipal officers are judges of their own election.
404. Not granted to control discretion; lies to compel common council to consider nominations.
405. Effect of judgment of ouster upon mandamus to swear in claimant.
406. Mandamus to affix corporate seal to certificate of election.
407. Mandamus lies to correct wrongful amotion from municipal office.
408. Amotion from common council; doctrine of the kings bench.
409. Restoration of clerk of county commissioners; policemen.
410. Writ refused where officer is again liable to immediate removal or suspension.
411. Want of notice of proceedings for amotion.
412. Return to writ; right of amotion; custom of removal; misdemeanor.

§ 401. In conformity with the fundamental princi-
* 286 ple that mandamus lies to compel the performance of official duties, imperative in their nature and unaccompanied with any element of discretion, the courts will interfere by this extraordinary writ to compel the holding of a municipal election, where the duty is clearly obligatory and has been disregarded by the officers entrusted by law with its performance.[1] And where the president and board of trustees of an incorporated town have neglected within the time prescribed by law to give the requisite notice for the annual election of a new board of trustees, and afterwards refuse to call any meeting for such election, they may be set

[1] People v. Town of Fairbury, 51 Ill. 149; Lamb v. Lynd, 44 Pa. St. 336; State v. Common Council of Rahway, 4 Vroom, 110; McConihe v. The State, 17 Fla. 238; Attorney General v. City Council of Lawrence, 111 Mass. 90; People v. Common Council of Brooklyn, 77 N. Y. 503; King v. Mayor of Grampond, 6 T. R. 301. And see Rex v. Corporation of Wigan, Burr. 782.

in motion by mandamus.[1] So the duty of the common council of a city to elect certain municipal officers at a specified time may be enforced by mandamus.[2] So, too, when it is the duty of municipal authorities to supply vacancies in their number by election, the writ will go to require them to proceed to an election for this purpose.[3] And the writ will lie in such a case, notwithstanding the pendency of proceedings in quo warranto against one of such officers to try the title to his office.[4] Nor is it essential that a demand and refusal should be shown to warrant interference by mandamus, the delay in proceeding to the election being regarded as equivalent to a direct refusal on the part of the officers.[5] It is to be observed, however, that the writ issues to compel the holding of a municipal election, only upon the supposition that there is an actual vacancy in the office, and if the office be already filled by an officer *de facto*, claiming under color of right, mandamus will not lie to compel a new election, but the party aggrieved will be left to his remedy by information in the nature of a quo warranto.[6] And the granting of two concurrent writs to compel the holding of a * 287 municipal election is not a matter of course, and will not be allowed without special cause shown.[7]

§ 402. The propriety of the writ of mandamus to compel admission to municipal offices, although not very firmly established, either upon principle or authority, has yet been recognized, and the court of kings bench has granted the writ to compel the admission of a town clerk to his office,[8] and to compel the mayor of an incorporated town to swear in

[1] People *v.* Town of Fairbury, 51 Ill. 149.

[2] Lamb *v.* Lynd, 44 Pa. St. 336.

[3] King *v.* Mayor of Grampond, 6 T. R. 301; State *v.* Common Council of Rahway, 4 Vroom, 110.

[4] King *v.* Mayor of Grampond, 6 T. R. 301.

[5] State *v.* Common Council of Rahway, 4 Vroom, 110.

[6] Queen *v.* Guardians of St. Martins, 17 Ad. & E. N. S. 149; Frost *v.* Mayor of Chester, 5 El. & Bl. 531.

[7] Rex *v.* Corporation of Wigan, Burr. 782.

[8] King *v.* Slatford, 5 Mod. Rep. 316.

the town clerk.[1] Indeed, as regards the administering of the oath of office to such municipal officers as appear to be elected, there would seem to be no impropriety in granting the writ, even though it is conceded that the court has no jurisdiction to judge of the election itself, since the administering of the oath is considered only as incidental to the question of election.[2] And the writ has been granted to compel the common council of a municipal corporation to receive and count the vote of a member of the council duly elected and qualified, and to permit him to exercise the duties of his office.[3] So it has been granted to require the members of a board of municipal officers to receive and act with the relator as a member of such board, when he has been duly elected thereto.[4]

§ 403. Where municipal boards are made by law the judges of the elections, qualifications and returns of their own officers or members, the powers thus vested in them are held to be so far discretionary as to be beyond control by mandamus. And while it is competent for the courts, in such cases, to set the municipal authorities in motion, and to require them to hear and determine the question of the election of a claimant, they will go no further, and will not direct what particular judgment shall be given.[5] Where, therefore, a board of municipal officers, vested with such discre-
* 288 tionary powers, have refused to admit an applicant,

[1] Queen v. Mayor of Hereford, 6 Mod. Rep. 309; King v. Knapton, 2 Keb. 445. And it is held in England to be no sufficient objection to the granting of an alternative mandamus to admit one to a municipal office, that a previous application of the same nature had been made and refused with respect to a former election. King v. Mayor of London, 1 Nev. & Man. 285.

[2] *Ex parte* Heath, 3 Hill, 42.

[3] Queen v. Mayor of Leeds, 11 Ad. & E. 512; State v. Mayor of Paterson, 35 N. J. L. 196. See also State v. Freeholders of Hudson Co. 35 N. J. L. 269.

[4] Putnam v. Langley, 133 Mass. 204.

[5] State v. Common Council of Rahway, 4 Vroom, 110; Supervisors of Mason Co. v. Minturn, 4 W. Va. 300. See also Mayor of Vicksburg v. Rainwater, 47 Miss. 547. But see, *contra*, State v. Wilmington City Council, 3 Harring. 294.

mandamus will not lie to review their proceedings.[1] So where the aldermen of a city are by law made the judges of the election and qualifications of their own members, with power to order elections, they are regarded as being vested with discretionary powers, partaking in some degree of a judicial nature, in determining who is duly elected. When, therefore, they have passed upon the application of one claiming to be duly elected to the common council, and have decided adversely to his application, mandamus will not go to compel them to issue a certificate of election to the claimant.[2] So if the city council have passed upon an election and declared the person entitled to a seat as a member of such council, a proceeding by a contesting claimant to unseat such member should be by *quo warranto*, and mandamus will not lie for the admission of the contestant.[3]

§ 404. In conformity with the fundamental doctrine denying the aid of mandamus to control the exercise of official judgment or discretion, the writ will not go to control the action of a board of municipal officers, such as a town council, sitting as a board of canvassers of elections, and authorized by law to strike from the voting list the name of any voter upon satisfactory proof that he is not qualified to vote. The action of such officers partakes of a judicial nature, and when they have passed upon the question and have stricken a name from the voting list after a hearing, they can not be required by mandamus to restore the name, since the courts will not, by this process, review the errors of inferior tribunals of a judicial or quasi-judicial character.[4] Where, however, an act of legislature provides for the nomination by the mayor of a city of a board of public works for the city, and it is also made the duty of the common council to

[1] Supervisors of Mason Co. *v.* Minturn, 4 W. Va. 300; Peabody *v.* School Committee, 115 Mass. 383.

[2] Mayor of Vicksburg *v.* Rainwater, 47 Miss. 547.

[3] State *v.* City Council of Camden, 42 N. J. L. 335; People *v.* Fitzgerald, 41 Mich. 2.

[4] Weeden *v.* Town Council of Richmond, 9 R. I. 128.

consider and act upon the nominations thus made, but they refuse to perform this duty, on the ground of the alleged unconstitutionality of the law requiring it, mandamus will go to compel them to consider the nominations, if the court is satisfied that the main purpose of the act is within the legitimate province of legislative action, and not in conflict with the constitution.[1]

§ 405. Where the writ is sought to compel the * 289 swearing in of a person claiming the right to hold a municipal office, as that of mayor of a city, it is a sufficient objection to the interference that judgment of ouster has been rendered against the relator, upon an information in the nature of a quo warranto to test his title to the office, the effect of such a judgment, whether proper or improper in itself, being to work a complete amotion from the office, entirely excluding the person removed so long as it remains in force.[2] And it is not error to refuse a mandamus to the mayor of a city to make a nomination to the board of aldermen for a municipal office, while an information is pending to try the title to such office.[3]

§ 406. In England the alternative writ issues as of course to compel a municipal corporation to affix its corporate seal to the certificate of election of a municipal officer, the case being regarded as akin to that of administering the official oath to an applicant. And in such case the mandamus is not conclusive upon the right of the actual incumbent of the office, who may contest the right upon return to the writ.[4]

§ 407. We have already seen, in considering the law of mandamus as applicable to private corporations, that the writ is freely granted in cases of wrongful amotion from a corporate office, for the purpose of restoring the party

[1] People v. Common Council of Detroit, 6 Chicago Legal News, 176, Supreme Court of Michigan.

[2] King v. Serle, 8 Mod. Rep. 332.

[3] Attorney General v. Mayor of New Bedford, 128 Mass. 312.

[4] King v. Mayor of York, 4 T. R. 699.

aggrieved to the enjoyment of his franchise.[1] Upon principles analogous to those governing the jurisdiction in cases of private corporations, the courts will interpose their aid by mandamus to restore a municipal officer, who has been removed from his position without sufficient cause, and the jurisdiction may be traced to a very early date in the kings bench.[2]

§ 408. As illustrating the grounds upon which the jurisdiction has been exercised to correct an improper amotion from a municipal office, it has been held in England that a member of the common council of a city, who had been removed upon the sole ground of bankruptcy, might be restored by mandamus.[3] And the rule was laid down at an early day by the kings bench, that a member of a municipal corporation could only be disfranchised for some act tending to the destruction of the body corporate, or of its liberties and privileges, and that a mere personal offense from one member of the corporation toward another did * 290 not constitute sufficient cause for amotion, and the removal of a corporator for such offense would be redressed by mandamus.[4] And the writ has been granted to restore an alderman of a city who had been expelled from his priority and precedence of place as alderman.[5]

§ 409. The peremptory writ will go to a board of county commissioners to restore their clerk to his office, from which he has been removed, when there appears on the record, which is taken as the return, no cause of removal, the statutes of the state requiring the cause of removal to be stated upon the record.[6] And the writ will lie to the municipal authorities of a city to compel the restoration of policemen who

[1] See § 291 *ante, et seq.*

[2] See Rex *v.* Town of Liverpool, 2 Burr. 723; Sir Thomas Earle's case, Carth. 173; King *v.* City of Canterbury, 1 Lev. part I, 119; Rex *v.* Mayor of Oxford, 2 Salk. 428.

[3] Rex *v.* Town of Liverpool, 2 Burr. 723.

[4] Sir Thomas Earle's case, Carth. 173.

[5] King *v.* City of Canterbury, 1 Lev. part I, 119.

[6] Street *v.* County Commissioners, Breese, Beecher's edition, 50.

have been improperly excluded from their office, and to permit them to exercise their functions and to draw their salaries.[1]

§ 410. While the propriety of the writ as a remedy for the wrongful amotion of a municipal officer is thus clearly established, the relief will be withheld when it is either admitted by the party, or is apparent from the return that if restored to his franchise he is liable to be again immediately removed for the same cause.[2] So if the officer, instead of being removed, has only been suspended, even though the proceedings for his suspension were irregular, if it appears by his own showing that his conduct has been such as to constitute reasonable and sufficient ground for the suspension, mandamus will not lie to restore him to his office.[3]

§ 411. While want of notice to the person removed of the proceedings for his removal is ordinarily deemed a sufficient objection to the validity of the proceeding, yet, where the officer has actually been heard in his own behalf upon charges of misbehavior, which are fully proven, and he is removed from his office, he can not rely upon the fact * 291 that he was not summoned to answer the charges.[4]

And it is a sufficient return to the alternative writ to restore one to his corporate office, that he was heard in his own defense, without alleging that he was summoned to answer the charges.[5]

§ 412. Where the writ is invoked for the purpose of compelling the authorities of a city to recognize and restore an officer whom they have deposed from his position, it is sufficient to return that the officer was removable at the

[1] People v. Board of Police, 35 Barb. 527; Same v. Same, Ib. 535; Same v. Same, Ib. 544; Same v. Same, Ib. 644; Same v. Same, Ib. 651.

[2] Rex v. Mayor of Axbridge, Cowp. 523; King v. Mayor of Bristol, 1 Dow. & Ry. 389.

[3] King v. Mayor of London, 2 T. R. 178.

[4] Rex v. Mayor of Wilton, 2 Salk. 428.

[5] King v. Mayor of Wilton, 5 Mod. Rep. 257.

pleasure of the municipal authorities, and that they had legally and rightfully discharged him, and such return is not demurrable.[1] But if the corporation relies, in justification of its conduct, upon a custom of removal at pleasure, the return to the alternative writ directing the restoration of a municipal officer should allege such custom positively, and it is insufficient to show the custom merely by way of recital.[2] And where a municipal officer, holding his office at the will of the corporate authorities, is disfranchised, and upon mandamus to restore him the corporation does not rely upon its power of removal, but returns a misdemeanor as the cause of amotion, which is held to be an insufficient cause, the peremptory writ will go to restore the officer.[3]

V. Municipal Improvements, Streets and Highways.

§ 413. The general rule stated and applications thereof.
414. Obstruction of streets; power construed as duty; toll ferry.
415. Liability of officer to penalty no bar to mandamus; remedy at law.
415 *a*. Relief refused when existence of road questioned; not granted to enforce contract rights.
416. Degree of interest required of relator.
417. Duty must be an actual, present duty; discretion of officers; sanction of other officers.
418. Discretion of municipal authorities not interfered with.
419. Action of municipal authorities not reviewed by mandamus.
420. Awarding contract for paving street.
421. Mandamus for payment of damages in opening street.
422. Damages should be assessed or paid before mandamus granted to open road; effect of discontinuing road.
423. Duty must be plain and unmistakable.
424. Municipal proceedings presumed regular; writ refused where it would render officers liable in trespass.
425. Signing municipal bonds; payment of money for public improvement.

[1] City of Madison *v.* Korbly, 32 Ind. 74.

[2] Rex *v.* Mayor of Coventry, 2 Salk. 430.

[3] Rex *v.* Mayor of Oxford, 2 Salk. 428.

426. Effect of subsequent discontinuance of proposed improvement.
427. Erection of wharf heads.
428. Discretion in apportionment of expense incurred.
429. Statutory remedy a bar to the writ.

§ 413. The duties of municipal corporations in * 292 maintaining and keeping in repair improvements of a public nature, such as highways, streets and bridges, afford frequent occasion for invoking the extraordinary remedies of the courts, and the jurisdiction by mandamus over this class of cases is well established. The existence of an obligation on the part of the authorities of a municipal corporation in regard to such improvements, lays the foundation for relief by mandamus, in the absence of other adequate and specific remedy, and, in as far as the obligation is in the nature of a ministerial duty, unaccompanied by any discretionary powers, it is peculiarly within the control of the writ of mandamus. And it is a general rule applicable to all municipal corporations, that whenever the duty is plainly incumbent upon such bodies of making local improvements, such as streets, highways or bridges, or of keeping in repair improvements already constructed, and the obligation is so plain and imperative as to leave no room for the exercise of any discretion upon the part of the municipal authorities, mandamus will lie to enforce the obligation.[1] For example,

[1] Borough of Uniontown *v.* The Commonwealth, 34 Pa. St. 293; Commissioners of York Co. *v.* The Commonwealth, 72 Pa. St. 24; City of Ottawa *v.* The People, 48 Ill. 233; People *v.* City of Bloomington, 63 Ill. 207, 5 Chicago Legal News, 136; People *v.* County of San Luis Obispo, 50 Cal. 561; State *v.* Supervisors of Wood Co. 41 Wis. 28; Pumphrey *v.* Mayor of Baltimore, 47 Md. 145; Trustees *v.* Kinner, 13 Bush, 334; Richards *v.* County Commissioners, 120 Mass. 401; State *v.* Demaree, 80 Ind. 519; State *v.* Commissioners of Gibson Co. 80 Ind. 478; People *v.* Supervisors of San Francisco, 36 Cal. 595; Hammar *v.* City of Covington, 3 Met. Ky. 494; People *v.* Common Council of Brooklyn, 22 Barb. 404; People *v.* Collins, 19 Wend. 56. But see, *contra*, Reading *v.* The Commonwealth, 11 Pa. St. 196, where it is held that mandamus, being grantable only in cases of last necessity, and where no other adequate and specific remedy exists, it

where a board of county supervisors are required by statute to make certain local improvements, such as * 293 the grading of streets, the duty being absolute and unqualified, and of a ministerial nature, the board may be compelled to act by mandamus.[1] And where, by act of legislature, the duty is plainly and imperatively incumbent upon the common council of a city to make certain street improvements, the writ will issue for the enforcement of the obligation.[2] Nor does the fact that certain incidents and details of the work are left discretionary with the authorities, as regards the manner of their execution, render the duty less mandatory, or constitute a bar to relief by mandamus.[3] So where a municipal corporation is required by law to maintain and keep in repair certain bridges, or to keep them open for the passage of boats, mandamus is the appropriate remedy to compel the performance of such duty, there being no discretion left to the corporate authorities, and no other legal and specific remedy.[4] And when the imperative duty is imposed upon a board of municipal officers of opening a highway, upon a route indicated by a special commission or board of officers appointed for that purpose by the legislature, mandamus will lie to compel the performance of the duty, and in such case the inferior board can not, by their return to the alternative writ, question the decision of the commission locating the route.[5]

§ 414. Where the common council of a city is empowered by its charter to keep in repair the streets of the city, and to remove all obstructions therefrom, the grant of power will be construed for the public benefit, and its execution may be

will not lie to compel the officers of a town or city to keep open a street and sidewalk, the proper remedy for the obstruction being by indictment.

[1] People v. Supervisors of San Francisco, 36 Cal. 595.

[2] People v. Common Council of Brooklyn, 22 Barb. 404.

[3] People v. Supervisors of San Francisco, 36 Cal. 595.

[4] City of Ottawa v. The People, 48 Ill. 233; Howe v. Commissioners of Crawford Co. 47 Pa. St. 361.

[5] People v. Collins, 19 Wend. 56.

insisted upon as a public duty. And in such case the writ will be granted to require the municipal authorities to remove houses, fences and other obstructions from the streets.[1] So when it is the duty of a supervisor of roads to remove all obstructions from highways, the performance of this duty may be enforced by mandamus.[2] If, however, the obstructions are of long standing and have been maintained as a matter of right by property owners for many years, and if the duty of the commissioners to remove them is not clearly established the relief will be withheld.[3] And when the duty is incumbent upon a municipal corporation of maintaining and operating a ferry as a toll ferry, but they have directed that it be operated free of tolls, mandamus will go to direct them to continue to collect the tolls and to operate the ferry as a toll ferry.[4]

§ 415. The fact that the officer on whom the duty
* 294 of opening a road is incumbent, is liable to a penalty for non-fulfillment of his duty, will not prevent the courts from extending relief by mandamus, since the penalty is not a specific remedy and may be paid or satisfied in full, and yet the road not be opened. An overseer of highways may, therefore, be required by mandamus to open a road in accordance with the plain and positive requirements of the law, notwithstanding the penalty for failure to perform this duty.[5] If, however, a sufficient remedy exists at law, by which the obstruction may be removed and the person obstructing the highway may be indicted, the writ will be refused.[6]

§ 415 *a*. The writ will not go to compel highway commissioners to levy a tax for and to open a road, when the legality and existence of the road are in review upon a direct

[1] People *v.* City of Bloomington, 63 Ill. 207, 5 Chicago Legal News, 136.

[2] Larkin *v.* Harris, 36 Iowa, 93; Patterson *v.* Vail, 43 Iowa, 142.

[3] Commissioners *v.* The People, 66 Ill. 339.

[4] Attorney General *v.* Boston, 123 Mass. 460.

[5] State *v.* Holliday, 3 Halst. 205.

[6] Commissioners of Highways *v.* The People, 73 Ill. 203.

proceeding bringing them in question.[1] And since the writ is not allowed to enforce the performance of contract rights of a private and personal nature, involving no question of public trust or official duty, it will not be granted to compel a city to construct a street in a special manner, not required by law, but which it is claimed has been agreed upon between the city and a property-owner.[2]

§ 416. As regards the degree of interest in the improvement in question which the relator must show to entitle himself to relief, it would seem, where the writ is sought to compel city authorities to keep the streets in repair, that property-owners fronting on the streets to be affected are competent relators, and have a sufficient interest in the subject matter to entitle them to relief.[3] And where the remedy is resorted to for the enforcement of a strictly public right, such as maintaining bridges over a navigable river and keeping them open for the passage of boats, the people are regarded as the real party seeking relief, and the relator need not show any legal interest in the result. It is enough, in such case, that he is interested as a citizen in the execution of the laws and in the enforcement of the particular duty in question.[4]

§ 417. To warrant the exercise of the jurisdiction by mandamus in the class of cases under consideration, it must clearly appear that there is an actual, present duty on the part of the municipal authorities, and that this duty has * 295 not been performed. And where a general duty is

[1] Commissioners of Highways *v.* The People, 99 Ill. 587.

[2] Parrott *v.* City of Bridgeport, 44 Conn. 180.

[3] Hammar *v.* City of Covington, 8 Met. Ky. 494.

[4] City of Ottawa *v.* The People, 48 Ill. 233. But see State *v.* Inhabitants of Strong, 25 Me. 297, where it is held that the writ will not be granted requiring county authorities to lay out a public road, at the relation of a citizen who shows no especial interest of his own to be promoted by the road, and who fails to show that his rights are more impaired than those of other citizens by the omission of duty complained of. For a more extended discussion of the degree of interest necessary to make one a proper relator in such cases, see Chapter VI, *post*, § 431, *et seq.*

imposed by statute upon a board of municipal or local officers, as the duty of draining a parish, involving all parts of the parish equally, there must of necessity be some degree of discretion on the part of the officers in determining upon the extent and order of their works, with reference to the necessities of different localities in the parish. The writ, therefore, will not go to command such officers to make a sewer for the use of a particular locality, when it is shown by their return that other parts of the parish are being drained which are of more importance to the public, and that the particular work sought by the mandamus is unnecessary, and that they are unable to do all the work required at once.[1] And to authorize the writ in this class of cases, it should clearly appear that the duty which it is sought to * 296 coerce is absolute and unconditional, and it is a fatal objection to granting the relief that the respondents are not authorized to perform the act sought, until they have first obtained the sanction and approval of another board of officers.[2]

§ 418. It is thus apparent that the test to be applied, in determining whether relief by mandamus shall be administered for the enforcement of that class of municipal duties under consideration, is, whether the obligation which it is sought to enforce is of a positive and mandatory character, or whether it is accompanied with or implies the exercise of official judgment and discretion on the part of the municipal authorities, and if the obligation be of the former class the courts do not hesitate to interfere. And this brings us to the consideration of another principle, equally important in determining whether an appropriate case is presented for the extraordinary aid of a mandamus. That principle is, that as to all questions connected with local and public improvements, such as maintaining and keeping in repair roads, streets, or bridges,

[1] Regina v. Vestry of St. Lukes, 5 L. T. R. N. S. 744. And see McMahon v. Board of Supervisors, 46 Cal. 214.

[2] Regina v. Vestry of St. Lukes, 5 L. T. R. N. S. 744.

concerning which the municipal authorities are vested with discretionary powers, and are required to exercise their own judgment in determining upon the necessity of the work or the manner of its execution, mandamus will not lie, since the law will not command the performance of an act, concerning the expediency or propriety of which the corporate authorities are themselves the judges.[1] Thus, where municipal authorities are authorized by act of legislature, without being peremptorily required, to construct a public road, it being left to their discretion to determine whether the work is desirable or necessary, they will not be required by mandamus to construct the road.[2] And where county commissioners * 297 are entrusted by law with the power of locating roads and highways, the question of what the public convenience requires in such location is regarded as peculiarly within the province of the commissioners, and their decision upon this point will not be revised by the courts, nor will mandamus lie to compel them to locate a road when they have already decided that the public convenience does not require its location.[3]

§ 419. It is further held, in conformity with the general doctrine laid down in the preceding section, that where a board of town officers are vested by law with full power to determine upon the utility and necessity of erecting or rebuilding bridges within the town, the refusal of such board to rebuild a bridge as desired by certain citizens of the town, affords no ground for the interposition of the extraordinary aid of a mandamus, no abuse of the discretion vested

[1] State v. Police Jury of Jefferson, 22 La. An. 611; State v. Freeholders of Essex, 3 Zab. 214; Mayor v. Roberts, 34 Ind. 471; Hill v. County Commissioners of Worcester, 4 Gray, 414; County of St. Clair v. The People, 85 Ill. 396; Haskins v. Supervisors, 51 Miss. 406; Rice Machine Co. v. Worcester, 130 Mass. 575; Hitchcock v. County Commissioners, 131 Mass. 519; State v. Morris, 43 Iowa, 192; State v. Commissioners of Henry Co. 31 Ohio St 211. See also upon the same subject, Dickerson v. Peters, 71 Pa. St. 53.

[2] State v. Police Jury of Jefferson, 22 La. An. 611.

[3] Hill v. County Commissioners of Worcester, 4 Gray, 414.

in the board being shown.[1] In such a case, where it is manifest that the granting of the writ would be attended with great expense and hardship, and that the end sought is to promote private rather than public interests, the case is regarded as appealing to the discretionary powers of the court, and the writ will be refused, unless the powers of the board are being abused.[2] And the question whether an improvement in the streets of a city shall be made and paid for out of the general fund in the city treasury, is a question with reference to which the judgment of the common council will not be reviewed or set aside by mandamus, and if granted in such a case the writ may be quashed on motion.[3]

§ 420. Again, it is held where certain municipal officers, such as a department of highways of a city, are authorized by a resolution of the common council of the city to enter into a contract with a competent person, who may be selected by a majority of the owners of property fronting on a * 298 certain street, for the paving of the street, a certain degree of discretion is vested in the department as to the competency of the person selected. A court will not, therefore, require them by mandamus to award the contract to any particular person, even though he may have been selected by a majority of the property-owners, they having afterwards selected another person before the contract was awarded.[4]

§ 421. Mandamus is the proper remedy to compel a city to take the necessary steps to provide for the payment of damages, awarded to property-owners by the opening of a street through their property, there being no other process to compel the city to proceed, since an action of trespass, if brought, would necessarily assume the proceedings to be void.[5] And

[1] State v. Freeholders of Essex, 3 Zab. 214.

[2] State v. Freeholders of Essex, 3 Zab. 214.

[3] Mayor v. Roberts, 34 Ind. 471.

[4] Dickerson v. Peters, 71 Pa. St. 53.

[5] State v. City of Keokuk, 9 Iowa, 438.

where a city street has been ordered to be opened or extended, commissioners for the assessment of damages having been duly appointed and having reported an assessment which has been confirmed, and the warrant having issued to collect the amounts assessed for payment of the damages, a peremptory mandamus will go to compel the city to collect and pay over the damages.[1] So where it is made the duty of a board of town officers to draw their warrant upon the treasurer, for the payment of damages awarded the relator for laying out a highway over his lands, the duty may be enforced by mandamus.[2] But where a board of county commissioners have, in accordance with the laws of the state, appointed a committee to determine the amount of damages caused by laying out a highway, the acceptance or rejection of the report of such committee is held to be a judicial and not a ministerial act, and the commissioners will not be required by mandamus to accept the report.[3]

§ 422. An important condition to be observed where mandamus is sought to compel municipal authorities to open streets and highways, is, that the claims of property holders for damages to their property caused by the * 299 opening of the road should be first adjusted or paid, before the courts will lend their interference.[4] And, in an application for mandamus against commissioners of highways, requiring them to open a road, the relators should aver in their petition and prove that the damages assessed as compensation to the land-owners have been paid or released, or that the necessary funds are at the disposal of the commissioners for this purpose, and where this does not appear it is error for the court to award a peremptory mandamus.[5] So the fact that the damages to property-owners through whose

[1] Higgins *v.* City of Chicago, 18 Ill. 276.

[2] People *v.* Township Board, 2 Mich. 187.

[3] *In re* Proprietors Kennebunk Toll Bridge, 11 Me. 263.

[4] People *v.* Curyea, 16 Ill. 547; Hall *v.* The People, 57 Ill. 307; People *v.* Commissioner of Highways, 1 N. Y. Sup. Ct. Rep. 193.

[5] Hall *v.* The People, 57 Ill. 307.

land the highway is to pass have not been assessed or paid, is a complete return to an alternative mandamus directing the commissioners to open the road.[1] It is also a good return to the writ, that after service thereof and before return, the highway has been discontinued by regular legal proceedings for that purpose.[2]

§ 423. While, as we have thus seen, mandamus is frequently allowed to enforce the performance of duties connected with public improvements at the hands of municipal authorities, the duties sought to be coerced must be of so plain and unmistakable a nature as to leave no room for doubt. And where a statute requires the supervisors of a county to contract for the erection of public buildings for the use of the county, but doubt exists, under the statute, as to the mode in which the duty shall be performed, so that different members of the board might have different opinions as to the manner in which they should act, the writ will not be granted.[3]

§ 424. Where the writ is sought to compel the common council of a city to open a street within the corporate limits, the proceedings of the council and of their agent in the matter will be presumed to be regular, and will not be called in question. And the court, in such case, will only * 300 determine as to the right of the applicants to have the street opened, and the duty of the city authorities to open it.[4] But the writ will not go to municipal officers requiring them to open a road, when it is manifest that by obeying the mandate of the writ the officers would render themselves liable to an action of trespass.[5]

§ 425. The writ will lie to compel the president of a

[1] People v. Commissioner of Highways, 1 N. Y. Sup. Ct. Rep. 193. See also People v. Curyea, 16 Ill. 547.

[2] People v. Commissioner of Highways, 1 N. Y. Sup. Ct. Rep. 193.

[3] State v. Supervisors of Washington Co. 2 Chand. 247.

[4] State v. Common Council of Orange, 2 Vroom, 131.

[5] *Ex parte* Clapper, 3 Hill, 458. And see People v. Commissioners of Highways, 27 Barb. 94.

municipal corporation to sign its bonds, which have been issued by authority of the legislature for carrying out a work of municipal improvement.[1] And where specific funds have been donated by a state to a county, to be held by the county in trust for the completion of certain public improvements, which funds have been mingled with the other moneys of the county, it is proper to allow a peremptory mandamus, requiring the payment of the money to the person entrusted with expending it for carrying out the work.[2]

§ 426. Mandamus will not go to a municipal corporation requiring it to proceed with the condemnation of property for purposes of street extension, when the extension has been abandoned and the ordinance repealed by the common council on grounds of public policy, and because the expense necessary in the prosecution of the work would be greater than the benefits to be derived from it. The granting of the writ in such a case would be to set aside and annul the deliberate action of the corporation, and to require private property to be devoted to public uses, and highways to be opened, contrary to the expressed will of the public.[3] Where, however, damages for the opening of a road over relator's premises have actually been awarded, the subsequent discontinuance of the road is no bar to relief by mandamus to compel the county authorities to pay the amount allowed, the right to damages in such case being regarded as vesting as soon as the verdict is returned and accepted, and the right is not, therefore, affected by the subsequent discontinuance of the * 301 road.[4]

§ 427. Where, by an act of legislature, the duty is devolved upon the mayor and common council of a city, together with other persons specified, of appointing commissioners to determine the proper water line for the erection of wharf-heads, the statute being mandatory and not merely

[1] People v. White, 54 Barb. 622.

[2] County of Pike v. The State, 11 Ill. 202.

[3] State v. Graves, 19 Md. 351.

[4] Harrington v. County Commissioners, 22 Pick. 263.

directory in its provisions, the enforcement of the duty is a proper subject for the exercise of the jurisdiction by mandamus, since a positive, statutory right is created, and the party aggrieved has no other redress, either legal or equitable.[1]

§ 428. County commissioners, who are vested by law with the power of directing that a portion of the expense incurred by a town in making a highway shall be paid out of the county treasury, and who have refused the exercise of this power in a given case, can not be compelled to exercise it by mandamus, it being of a judicial nature, and therefore not subject to control. And this is so, regardless of whether the commissioners have decided properly or improperly upon the application.[2]

§ 429. Notwithstanding the jurisdiction by mandamus over municipal officers entrusted with the location of streets and other kindred improvements, is, as we have seen in the preceding sections, well established and clearly defined, it will not be exercised to the exclusion of special remedies provided by law. Mandamus will not, therefore, lie to a board of county commissioners, commanding them to locate a particular highway and to make an order for the payment of damages to be thereby sustained, when a statute has provided ample remedy by appeal from the decision of the commissioners.[3]

[1] Mayor v. State of Georgia, 4 Geo. 26.

[2] Inhabitants of Ipswich, Petitioners, 24 Pick. 343.

[3] Commissioners of Boone v. The State, 38 Ind. 193.

CHAPTER VI.

OF THE PARTIES TO THE WRIT.

I. PARTIES FOR WHOM THE WRIT IS GRANTED, ... § 430
II. PARTIES AGAINST WHOM THE WRIT IS GRANTED, ... 440

I. PARTIES FOR WHOM THE WRIT IS GRANTED.

§ 430. Proceedings instituted in name of state or sovereign.
430 *a*. When proceedings brought in name of attorney general.
431. Degree of interest necessary on part of relator; distinction between cases of public and private right.
432. The distinction denied in some of the states.
433. The distinction further illustrated.
434. Real party in interest should be relator; payment of order on city treasurer; joinder of different claimants.
435. County commissioners not proper relators for mandamus to keep turnpike in repair.
436. Degree of interest fixed by statute; voters for location of county seat.
437. Survivorship of action.
438. Mandamus to admit child to public schools or to compel use of text books; the father a proper relator.
439. Distinct interests can not be joined; restoration of members of common council; damages for laying out road.

§ 430. The remedy by mandamus, as discussed and illustrated in the preceding chapters, has been shown * 302 to be substantially a civil remedy in its nature, and one which is applied for the protection of purely civil rights. The proceedings, however, are usually instituted in the name of the state or sovereign, upon the relation or information of the attorney general, or of the party aggrieved. It is diffi-

cult to perceive any satisfactory reason why the proceedings should not be conducted as in ordinary civil actions
* 303 for the protection of private rights, merely in the name of the actual parties in interest as plaintiff and defendant, as is done in some of the states, without introducing the state or sovereign power as the prosecutor. This method, however, of instituting the proceedings is of very ancient origin, and seems to have had its foundation in the theory which formerly prevailed, regarding the writ of mandamus as purely a prerogative writ, issuable not of right, but only at the pleasure of the sovereign, and hence issued only in his own name and as an attribute of his sovereignty. And while the tendency of the courts in modern times is to disregard the prerogative theory of the writ, and to treat it as an ordinary writ of right, issuable as of course upon proper cause shown, many of the courts still adhere to the former theory, as far, at least, as to consider the proceedings properly instituted only in the name of the state. Thus, in Ohio, it is held that from the nature of the writ as a command issuing from the sovereign power, it is properly prosecuted in the name of the state as the sovereign, upon the information of the actual party in interest, and that the adoption of the code of procedure has not made any essential change in the writ or proceedings thereunder in this respect.[1] And in Iowa, proceedings in mandamus are regarded as a
* 304 prosecution, within the meaning of the constitution of the state which requires all prosecutions to be conducted in the name and by the authority of the state. It is, therefore, considered erroneous in that state that the proceedings should be conducted in the name of an individual citizen, and when the object sought is to enforce a duty for merely private ends, the action should be conducted in the name of the state, upon the relation of the informant.[2] The tendency of the courts, however, is to regard the use of the name of

[1] State v. Commissioners of Perry, 5 Ohio St. 497.

[2] Chance v. Temple, 1 Iowa, 179. See as to the degree of interest re-

the sovereign power as prosecutor to be merely nominal, the remedy being regarded as essentially a civil remedy.[1] And in Kansas, it is held, under the statutes of the state, that the action of mandamus, like other civil actions, should be prosecuted in the name of the real party in interest, or, if in behalf of the people, in the name of the proper public officer.[2]

§ 430 *a*. The proceedings are frequently instituted by or in the name of the attorney general, when the controversy is one which affects a public right. And in determining whether the action may be maintained by the attorney general, the controlling question is, whether the injury which it is sought to redress is public in its nature, affecting public interests, or whether it is a private injury, which affects only private rights. In the former class of cases the proceedings should be brought by the attorney general, but in the latter class by the persons in interest.[3] It has, however, been held that when the duty whose performance is sought is of a public nature and due from the respondent to the public at large, but not to the government as such, the proceeding may be brought by private citizens, without the intervention of the attorney general.[4]

§ 431. As regards the degree of interest on the part of the relator, requisite to make him a proper party on whose information the proceedings may be instituted, a distinction is taken between cases where the extraordinary aid of a mandamus is invoked, merely for the purpose of enforcing or protecting a private right, unconnected with the public

quired to render a person a proper plaintiff or relator under the code of Iowa, Moon *v.* Cort, 43 Iowa, 503.

[1] Brower *v.* O'Brien, 2 Ind. 423.

[2] State *v.* Commissioners of Jefferson Co. 11 Kan. 66; Hagerty *v.* Arnold, 13 Kan. 367; State *v.* Faulkner, 20 Kan. 541.

[3] Attorney General *v.* Albion Academy, 52 Wis. 469; Attorney General *v.* Boston, 123 Mass. 460.

[4] Union Pacific R. Co. *v.* Hall, 91 U. S. 343, affirming S.C. 3 Dill. 515. And under the statutes of Ohio, it is held that a proceeding in mandamus to compel the giving of notice of an election for county judge may be brought by a citizen of the county, without the attorney general. State *v.* Brown, 38 Ohio St. 344.

interest, and those cases where the purpose of the application is the enforcement of a purely public right, where the people at large are the real party in interest. And while the authorities are somewhat conflicting, yet the decided weight of authority supports the proposition that, where the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject-matter, since he is regarded as the real party in interest and his rights must clearly appear. On the other hand, where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the
* 305 result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws.[1]

§ 432. Notwithstanding the strong array of authority in support of the doctrine as laid down in the preceding
* 306 section, and in the opinions of the courts cited in its support, the contrary doctrine has been earnestly contended for and has the support of some respectable authorities. Thus, it is held in Maine, that a private citizen is

[1] County of Pike *v.* The State, 11 Ill. 202; City of Ottawa *v.* The People, 48 Ill. 233; School Trustees *v.* The People, 71 Ill. 559; Village of Glencoe *v.* The People, 78 Ill. 382; Pumphrey *v.* Mayor of Baltimore, 47 Md. 145; State *v.* Gracey, 11 Nev. 223; Moses *v.* Kearney, 31 Ark. 261; McConihe *v.* The State, 17 Fla. 238; State *v.* Board of County Commissioners, 17 Fla. 707; State *v.* Shropshire, 4 Neb. 411; People *v.* Supervisors of Kent Co. 38 Mich. 421; Hamilton *v.* The State, 3 Ind. 452; People *v.* Collins, 19 Wend. 56; Hall *v.* The People, 57 Ill. 307; People *v.* Halsey, 37 N. Y. 344; State *v.* County Judge of Marshall, 7 Iowa, 186. See also Lyon *v.* Rice, 41 Conn. 245; Peck *v.* Booth, 42 Conn. 271; State *v.* Henderson, 38 Ohio St. 644. See, *contra*, State *v.* Inhabitants of Strong, 25 Me. 297; People *v.* Regents of University, 4 Mich. 98; People *v.* Inspectors of State Prison, Ib. 187; Heffner *v.* The Commonwealth, 28 Pa. St. 108; Sanger *v.* County Commissioners of Kennebec, 25 Me. 291; Bobbett *v.* The State, 10 Kan. 9; Turner *v.* Commissioners, 10 Kan. 16; Reedy *v.* Eagle, 23 Kan. 254; Adkins *v.* Doolen, 23 Kan. 659.

entitled to a mandamus only when he has some particular interest or right to be protected, independent of that which he holds in common with the public at large. And when it does not appear that he has any interest to be promoted, or that his rights are in any degree impaired by the omission of duty complained of, more than those of any other individual citizen, he will be denied the relief.[1] So in Michigan, the courts have denied the right of an individual citizen to institute proceedings in mandamus against public officers to compel the performance of a public duty, unless he shows some special interest, or clear, legal right in the matter.[2] So in Pennsylvania, it is held that munici- * 307 pal authorities will be set in motion and compelled by mandamus to perform a purely public duty, only upon the application of some person actually representing the public interests. Thus, a private citizen will not be allowed a mandamus to compel town authorities to open an alley within the corporate limits, even though the duty of opening the alley is imposed upon the corporation by an act of legislature, and although the individual relator shows a personal interest in the matter from the enhanced value likely to accrue to his adjoining property by the opening of the alley.[3] And in Kansas, it is held that mandamus will not lie at the suit of a private citizen for the performance of a purely public duty, when the relator shows no specific or peculiar interest in himself, different from that shared by the public at large, and that in such cases the relief should be sought in the name of the public and by its legal representative.[4] However satisfactory the reasoning of the courts in the states here referred to may appear, the undoubted weight of authority supports the doctrine as laid down in the previous section,

[1] State *v.* Inhabitants of Strong, 25 Me. 297.

[2] People *v.* Regents of University, 4 Mich. 98; People *v.* Inspectors of State Prison, Ib. 187.

[3] Heffner *v.* The Commonwealth, 28 Pa. St. 108.

[4] Bobbett *v.* The State, 10 Kan. 9; Turner *v.* Commissioners, 10 Kan. 16; Reedy *v.* Eagle, 23 Kan. 254; Adkins *v.* Doolen, 23 Kan. 659.

and the distinction there noticed is too well established to be easily overthrown.

§ 433. In conformity with this distinction between cases of public and of private right, it is held that a private citizen may properly be the relator in proceedings by mandamus, to compel the authorities of a municipal corporation to maintain a bridge and to keep it open for the passage of boats, these duties being required by law of the corporation.[1] So when the writ is sought to compel highway commissioners to comply with their duty in the opening of a public road, the question being one of public and not of private right, the people are the real party in interest, and the relator need not show any personal interest. In all such cases, the
* 308 refusal of the officers to act is no more the concern of one citizen than of another, and it is the right, if not the duty of every citizen to interfere and see that the public grievance is remedied.[2] So it is held that in such
* 309 matters of public right as the canvassing of election returns, any citizen may be a relator in an application for mandamus.[3] And the rule as sometimes stated, that the relator must show an individual right to the thing sought, is to be taken as applicable only to cases where individual interests are affected, and it has no reference to cases where
* 310 the interest is common to the whole community, or to

[1] City of Ottawa v. The People, 48 Ill. 233. "When the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. The relator is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the duty in question enforced." Per BREESE, C. J.

[2] People v. Collins, 19 Wend. 56; Hall v. The People, 57 Ill. 307. But see, *contra*, Heffner v. The Commonwealth, 28 Pa. St. 108; Sanger v. County Commissioners of Kennebec, 25 Me. 291.

[3] State v. County Judge of Marshall, 7 Iowa, 186.

the public at large.[1] At the same time it is regarded as especially appropriate, when the proceedings affect a particular public interest of the state, that the officer entrusted with the management of such interest should be the relator. Thus, when mandamus is sought to compel the performance of a duty affecting the finances of the state, it is especially appropriate that the officer particularly charged with the management of its finances should be the moving party.[2]

§ 434. In conformity with the distinctions already noticed, it is held, where proceedings are instituted in mandamus, to compel the treasurer of a public fund to pay an order drawn upon him, that the relator should be the real party in interest, namely, the holder of the order, and not the party by whom it was drawn, and that if granted upon the relation of the latter, the writ should be quashed. For example, where the writ is sought upon the relation of the board of education of a city to compel the city treasurer to pay certain orders, drawn by the board in favor of a contractor for the erection of school buildings, the board having parted with their interest in the funds by drawing and delivering the orders, are not proper parties to institute proceedings to compel payment, where the real party in interest sees fit to acquiesce in the refusal to pay.[3] And the proper parties to a proceeding in mandamus being the relator who is interested in the performance of some specific duty imposed by law, and the respondent or defendant, at whose hands the duty is required, the courts will not permit parties who are only collaterally interested to be joined as parties.[4] So it is a sufficient objection to granting the writ that too many parties * 311 have joined in the application. Thus, where different claimants of money due from the state, join in proceedings for mandamus to compel the payment of the money, alleging their claims to be separate, the application will be refused.[5]

[1] People v. Halsey, 37 N.Y. 344.
[2] State v. Hamilton, 5 Ind. 310.
[3] State v. Haben, 22 Wis. 630.
[4] State v. Smith, 7 Rich. N. S. 275.
[5] Heckart v. Roberts, 9 Md. 41.

§ 435. A board of county commissioners, acting as an administrative body, or as a quasi corporation, with certain limited powers and duties prescribed and fixed by law, are not proper parties to compel by mandamus a turnpike company to keep in repair a bridge forming a part of the company's road, when such commissioners are vested by law with no supervision or control over such matters.[1]

§ 436. In some of the states, the degree of interest necessary to make one a proper party to institute the proceedings is fixed by statute. And it is held that the effect of a statute, which provides that the writ may be issued upon the information, under oath, of the party beneficially interested, is not to render any person a competent relator, regardless of whether he has any right or interest to be protected, but only to warrant the writ in behalf of the public, through * 312 its officers, for the enforcement of a public duty, or in behalf of a private citizen whose interests are to be affected, or whose rights are to be enforced.[2] But under such a statute, it is held that voters in certain townships, whose votes have been rejected in the canvass of an election upon the location of a county seat, and who have thus been deprived of a voice in the election, are parties beneficially interested within the meaning of the act, and hence proper relators to compel a re-canvass of the election.[3] Where, however, it is provided by statute that the writ of mandamus shall issue on the application of the party beneficially interested, it is held that a private citizen, having no other interest in the subject-matter than that pertaining to all citizens, is not entitled to the writ to compel a board of county supervisors to order an election upon the question of a removal of the county seat.[4]

§ 437. Proceedings for mandamus being strictly in the

[1] State v. Zanesville Turnpike Co. 16 Ohio St. 308.

[2] State v. County Judge of Davis Co. 2 Iowa, 280.

[3] State v. Bailey, 7 Iowa, 390.

[4] Linden v. Board of Supervisors, 45 Cal. 6.

nature of a personal action, it follows necessarily that they die with the person in whose behalf they have been instituted. They can not, therefore, be prosecuted by the personal representatives of the relator after his death.[1] If, however, the proceedings are instituted by a public officer in his official capacity, for the public benefit, as to obtain possession and custody of a building pertaining to him by virtue of his office, the action does not abate by the termination of his office, but may be prosecuted by his successor.[2]

§ 438. When it is sought by mandamus to compel a board of education to admit a minor child to the * 313 privileges of the public schools, while the proceedings are in reality for the benefit of the child, the father is the proper party to make the application, being the natural guardian of the child and charged with his education.[3] So a parent has such an interest, both as a tax-payer and as a parent, as to enable him to maintain proceedings in mandamus to compel the school authorities to allow his children to use in the public schools the text-books which have been lawfully selected for use. And the action, in such case, may be brought in the name of the state upon the relation of the parent, without the intervention of the attorney general.[4]

§ 439. Where the interests of several relators seeking redress by mandamus are separate and independent, they can not join in one and the same writ, but should have separate writs, according to their several interests.[5] Thus, where different members of the common council of a city, who have been removed from their offices, seek by mandamus to be restored, they can not all join in one writ, since, their inter-

[1] Booze v. Humbird, 27 Md. 1.

[2] Felts v. Mayor and Aldermen of Memphis, 2 Head, 650.

[3] People v. Board of Education of Detroit, 18 Mich. 400.

[4] State v. Board of Education, 35 Ohio St. 368.

[5] King v. City of Chester, 5 Mod. Rep. 10; King v. Mayor of Kingston-upon-Hull, 8 Mod. Rep. 209; Same v. Same, 11 Mod. Rep. 382; King v. Town of Andover, 12 Mod. Rep. 332; Anon. 2 Salk. 436. And see Hoxie v. Commissioners of Somerset, 25 Me. 333.

ests being several and independent, a joint restitution can not be awarded them.[1] And when two persons have been severally awarded damages, for injuries sustained by them individually in the laying out of a road across their respective lands, in which they have no common interest, it seems that they can not join in an application for a mandamus to compel the county authorities to pay such damages.[2]

II. Parties Against whom the Writ is Granted.

§ 440. Writ should run to person who is to perform duty; official capacity; joinder of respondents.
441. Writ may run to successors in office; the general rule and its illustrations.
442. Mandamus to municipal corporations, joinder of respondents.
443. Change of municipal officers, effect of.
444. Board of county commissioners.
445. Mandamus to pay interest on municipal-aid bonds, railway need not be a party.
446. Mandamus to courts, how addressed.
447. Writ not granted where it does not appear who is to make return.
447 *a*. Member of official board proper relator against the board.

§ 440. As regards the joinder of parties respond-
* 314 ent in writs of mandamus, the first general principle to be observed is, that the writ should run to the person or body whose duty it is to perform the act required.[3] It will not, therefore, lie to one person to command another to do the required act.[4] Nor is it the practice to make any other persons parties respondent than the officer whose conduct is complained of.[5] And when the purpose of the writ

[1] King *v.* City of Chester, 5 Mod. Rep. 10.

[2] Hoxie *v.* Commissioners of Somerset, 25 Me. 333.

[3] People *v.* Common Council of New York, 3 Keyes, 81; Regina *v.* Mayor of Derby, 2 Salk. 436; Farrell *v.* King, 41 Conn. 448.

[4] Regina *v.* Mayor of Derby, 2 Salk. 436.

[5] Fry *v.* Reynolds, 33 Ark. 450.

is to secure the performance of an official duty by a public officer, it should be addressed to him in his official and not in his private capacity.[1] But if the petition or application for the mandamus is against two officers jointly, and it can not be sustained as to one of them, it necessarily fails as to both.[2] Where, however, several writs have been asked against several persons in one and the same rule to show cause, it has been held that a peremptory mandamus might be allowed as to one and denied as to the others.[3]

§ 441. It would seem to be proper, in all cases where the aid of mandamus is invoked to compel the performance of official duties by public officers, after the expiration of their term of office, that the proceedings should be carried on against the successor of the officer, since the action is brought against him in his official and not in his individual capacity.[4] Thus, where the duty of assess- * 315
ing and levying a special tax is imposed by law upon a public officer, the statute fixing the duty not being limited to any particular incumbent of the office, the duty will be treated as obligatory upon successors in the office, and its performance may be required of them by mandamus.[5] And where proceedings in mandamus are instituted against a state auditor, to compel him to issue his warrant upon the state treasurer, for the payment of an indebtedness due from the state, the resignation of the auditor and the appointment and qualification of his successor, present no defense, either in abatement or in bar of the action, which may be carried on

[1] Chance *v.* Temple, 1 Iowa, 179.

[2] People *v.* Yates, 40 Ill. 126.

[3] State *v.* Supervisors of Beloit, 20 Wis. 79.

[4] See Lindsey *v.* Auditor of Kentucky, 8 Bush, 231; Bassett *v.* Barbin, 11 La. An. 672; Commissioners of Columbia *v.* Bryson, 13 Fla. 281; Pegram *v.* Commissioners of Cleaveland, 65 N. C. 114; State *v.* Gates, 22 Wis. 210; State *v.* City of Madison, 15 Wis. 30; Maddox *v.* Graham, 2 Met. Ky. 56; Clark *v.* McKenzie, 7 Bush, 523; Hardee *v.* Gibbs, 50 Miss. 802; State *v.* Puckett, 7 Lea, 709; People *v.* Supervisors of Barnett, 100 Ill. 332. But see, *contra*, United States *v.* Boutwell, 17 Wal. 604.

[5] Bassett *v.* Barbin, 11 La. An. 672.

against the successor, it being substantially a controversy between the relator and the state.[1] Where, however, the officer goes out of office before the determination of the mandamus proceedings, and before judgment therein, and the action is not revived against his successor, it is improper for the court to give judgment against him as if he were still in office, and to award a peremptory mandamus against both him and his successor in office, since he may properly object that he no longer possesses the power to execute the commands of the writ.[2]

§ 442. Questions of considerable importance have * 316 arisen in determining upon the proper joinder of parties respondent, in cases of mandamus to municipal corporations. The doctrine of the kings bench, established at an early period, seems to have been that the mandamus should be directed to the body politic by its corporate name, and it was held that if the writ was not thus directed, but ran to the mayor and aldermen of the municipality, it might be quashed.[3] But in this country, the doctrine is well established, that in cases of mandamus to coerce the performance of a duty incumbent upon a municipal corporation, such as the duty of levying a tax to provide for the payment of a judgment against the municipality upon its bonds, the writ may properly run to the mayor and aldermen of the corporation, without being directed to the municipality in its corporate name.[4] And when the municipal corporation is composed of several distinct bodies or organs, the writ should be addressed to that particular branch of the municipal government, whose province and duty it is to perform the * 317 particular act, or to put the necessary machinery in

[1] Lindsey v. Auditor of Kentucky, 3 Bush, 231.

[2] Secretary v. McGarrahan, 9 Wal. 298.

[3] Regina v. Mayor of Hereford, 2 Salk. 701. And see King v. Taylor, 3 Salk. 231. But see King v. Mayor of Abingdon, Ld. Raym. 559.

[4] Mayor v. Lord, 9 Wal. 409; People v. Mayor of Bloomington, 63 Ill. 207, 5 Chicago Legal News, 136. And see People v. Common Council of New York, 3 Keyes, 81.

motion to secure its performance.[1] So when the duty whose performance is sought is incumbent upon a municipal body, such as a common council, or a board of county commissioners, and not upon its members individually, the writ is properly directed to such municipal body in its corporate capacity.[2] So, too, the writ should be directed against the entire board of municipal officers, and a failure in this respect is sufficient ground for dismissal.[3] And when mandamus is sought against the authorities of a city, and the duty whose performance is sought requires the action of the mayor as well as of the city council, the writ should run both to the mayor and to the council.[4]

§ 443. Proceedings by mandamus against municipal officers, to compel the performance of their official duties, being virtually proceedings against the corporation, a change in the membership of the officers does not so change the parties as to abate the proceedings, the municipal body being a continuous one, and the writ being addressed to the officers in their official capacity, rather than as individuals.[5] Indeed, this principle has been carried to the extent of allowing proceedings in mandamus against a municipal officer, in his official capacity, upon whom due service of process has been made, to be continued against his successor, without compelling the party aggrieved to begin *de novo*.[6] So when the duty whose performance is sought is obligatory upon municipal officers as a body, without regard to the persons composing such body, the names of the individual officers may be treated as surplusage. And in such case the court may properly disre-

[1] People *v.* Common Council of New York, 3 Keyes, 81.

[2] Commissioners *v.* Sellew, 99 U. S. 624; Village of Glencoe *v.* The People, 78 Ill. 382. But the fact that the writ is directed against such officers as individuals constituting the board has been held to be no ground for demurrer. State *v.* Wright, 10 Nev. 167.

[3] Lyon *v.* Rice, 41 Conn. 245, Peck *v.* Booth, 42 Conn. 271.

[4] Farnsworth *v.* City of Boston, 121 Mass. 173.

[5] Commissioners of Columbia *v.* Bryson, 13 Fla. 281.

[6] State *v.* City of Madison, 15 Wis. 30; State *v.* Gates, 22 Wis. 210. And see Lindsey *v.* Auditor of Kentucky, 3 Bush, 231.

gard any change in the persons composing the body.[1] And when the jurisdiction is invoked against the mayor and common council of a city, to compel the performance of an official duty, required of them by law, it is no objection to the alternative mandamus, that it does not show who compose the common council, since, if the peremptory writ should finally issue, it would be directed to the mayor and common
* 318 council, whoever they might be, commanding them to do the act required.[2]

§ 444. Where it is provided by statute, that all acts and proceedings by or against a county in its corporate capacity, shall be in the name of a board of county commissioners, by whom all the corporate functions of the county are to be exercised, such board of commissioners retains its perpetuity, notwithstanding changes in its individual members. Where, therefore, mandamus is sought to compel the performance of an official duty by such commissioners, the writ is properly directed to the board, and the different members composing it are bound to obey the mandate of the court.[3]

§ 445. In case of mandamus against the authorities of a municipal corporation, to compel the payment of interest on the bonds of the municipality, issued in aid of its subscriptions to a railway, it is not necessary that the railway company should be made a party to the proceedings, nor need the tax-payers of the city be joined, nor other holders of the securities.[4]

§ 446. Where the aid of a mandamus is invoked against an inferior court, it would seem to be sufficient, ordinarily, to address the writ either to the court as such, or to the individual judges composing it.[5] But where there are other judges authorized to hold the terms of the court, the manda-

[1] Sheaff v. The People, 87 Ill. 189.

[2] State v. City of Milwaukee, 25 Wis. 122.

[3] Pegram v. Commissioners of Cleaveland, 65 N. C. 114.

[4] Maddox v. Graham, 2 Met. Ky. 56.

[5] St. Louis County Court v. Sparks, 10 Mo. 118.

mus should be addressed individually, since in case of disobedience to the writ the power of enforcing obedience is exercised over the judges personally.[1]

§ 447. The fact that it does not appear who is the proper person to make return to an alternative mandamus, if granted, is a strong objection to the issuing of the writ, and where the very object of the proceeding is to determine this question, the application will be refused.[2]

§ 447 *a*. The technical rule that a person can not bring an action against an official board of which he is a member does not apply to proceedings in mandamus. A member of such a board may, therefore, in a proper case, maintain such proceedings against the board to enforce the performance of an official duty.[3]

[1] Hollister *v.* Judges, 8 Ohio St. 201.

[2] Queen *v.* Dolgelly Union, 8 Ad. & E. 561.

[3] Cooper *v.* Nelson, 38 Iowa, 440.

CHAPTER VII.

OF THE PLEADINGS IN MANDAMUS.

I. General Principles Governing the Pleadings, . . § 448
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I. General Principles Governing the Pleadings.

§ 448. The general rules of pleading applicable to mandamus; the statute of Anne and its effect.
449. Alternative writ should make out *prima facie* case; effect of demurrer to the writ.
450. Requisites of the petition.
450 *a*. Right of interpleader.
451. Alternative mandamus open to usual modes of pleading applicable to declaration.
452. Plea in abatement waived by plea to the merits.
453. Rule in California as to pendency of other proceedings.
454. Defects in substance in alternative writ, when taken advantage of; information not subject to demurrer.
455. Effect of motion to quash petition standing in lieu of alternative writ.
456. Requisites of application to compel issuing of tax deed.

§ 448. The general principles and rules of pleading may be said to prevail in cases of mandamus, as far as applicable to the subject-matter, and in the absence of statutory regulations to the contrary, the practitioner must still resort to and be governed by the rules established at common law. Prior to the passage of the statute of Anne,[1] the utmost strictness

[1] 9 Anne Ch. 20, see Appendix, A.

was required in the pleadings upon applications for mandamus, since the application was determined solely upon the alternative writ and the return, the relator's * 320 only remedy, if denied the relief, being by an action for a false return. The effect of the passage of the statute of Anne was to assimilate the proceedings, in cases falling within its provisions, to ordinary actions at law, the relator setting forth his right or cause of action in certain formal modes, to which the respondent set up his defense by way of return, the relator then being at liberty to plead to or traverse the return, and the respondent might then reply, take issue or demur.[1] The pleadings were thus made to conform substantially to those in ordinary actions at law, and subsequent legislation in England rendered the likeness still more complete. In some of the states of this country, the statute of Anne has been recognized by judicial decisions, as forming a part of the system of laws adopted by the colonies from the mother country, while in others its provisions have been substantially re-enacted, so that in most of the states of the Union it forms a component part of the law regulating the subject of mandamus. This important statute may be said to bear the same relation to the law of mandamus in America, as the original statute of frauds to the law of contracts, and it has formed the basis of most of the legislation in this country upon the subject of pleadings in mandamus.[2]

[1] See 3 Black. Com. 265; Commercial Bank *v.* Canal Commissioners, 10 Wend. 26. See, as to the effect of the code of procedure upon the writ of mandamus and the pleadings and procedure therein, Weber *v.* Zimmerman, 23 Md. 45.

[2] As to the pleadings and practice in mandamus in Mississippi, see State Board of Education *v.* West Point, 50 Miss. 638; Jones *v.* Gibbs, 51 Miss. 401; Haskins *v.* Supervisors, 51 Miss. 406; Beard *v.* Supervisors, 51 Miss. 542. As to the pleadings and practice in Indiana, see Smith *v.* Johnson, 69 Ind. 55; Commissioners of Clarke Co. *v.* The State, 61 Ind. 75; Commissioners of Boone Co. *v.* The State, 61 Ind. 379; Gill *v.* The State, 72 Ind. 266; Potts *v.* The State, 75 Ind. 336. See as to the pleadings under the Ohio code of procedure, and as to the effect of a motion to quash the writ, Fornoff *v.* Nash, 23 Ohio St. 335. As to the right of third persons to

§ 449. The alternative writ of mandamus is usually regarded as standing in the place of the declaration, in an ordinary action at common law.[1] Testing this writ, therefore, by the ordinary rules of pleading, its first requisite is, that it should make out a *prima facie* case entitling the party aggrieved to the extraordinary aid of the court.[2] It follows, also, as in ordinary actions, that a demurrer to the * 321 writ brings before the court the whole merits of the controversy, and the court will, on demurrer, proceed to examine accordingly.[3] But it is sufficient if the alternative writ contains all the allegations necessary to call into action the power of the court. And where the material facts on which the relator founds his application for relief are thus fully set forth, so that they may be admitted or traversed, and they are admitted by demurrer to be true, the only remaining question for the court to decide is as to the law applicable to the admitted facts.[4]

§ 450. It is incumbent upon the person seeking the extraordinary aid of a mandamus, to set up in his petition or application to the court for the writ all the facts specifically,

interplead in proceedings in mandamus under the statutes of Illinois, see Winstanley *v.* The People, 92 Ill. 402. As to the right to interplead in Missouri, see State *v.* Burkhardt, 59 Mo. 75. See as to the pleadings under the code of procedure in Kansas, Crans *v.* Francis, 24 Kan. 750. As to the pleadings in Wisconsin, see State *v.* Jennings, 56 Wis. 113. As to the pleadings and the making up of issues of fact in Michigan, see Roscommon *v.* Midland Supervisors, 49 Mich. 454.

[1] People *v.* Hilliard, 29 Ill. 418; People *v.* Hatch, 33 Ill. 139; Silver *v.* The People, 45 Ill. 227; People *v.* Mayor of Chicago, 51 Ill. 28; People *v.* Salomon, 46 Ill. 336; State *v.* Sheridan, 43 N. J. L. 82; Smith *v.* Johnson, 69 Ind. 55. But in Wisconsin, it is held that the petition on which the alternative writ issues performs the office of the declaration. State *v.* Lean, 9 Wis. 279.

[2] People *v.* Hatch, 33 Ill. 139; People *v.* Mayor of Chicago, 51 Ill. 28. In People *v.* Hatch, BREESE, J., delivering the opinion, says: "The alternative writ stands in the place of a declaration; it is the declaration of the relator, and as in an ordinary case commenced by a declaration, the plaintiff is bound to state a case *prima facie* good, so is a relator in this proceeding."

[3] People *v.* Mayor of Chicago, 51 Ill. 28.

[4] People *v.* Hilliard, 29 Ill. 418.

which, if true, would be necessary to entitle him to the relief sought,[1] and he must show a clear *prima facie* case to warrant the alternative writ.[2] And the relator should set forth in the petition or application, as well as in the alternative writ itself, all the facts upon which he relies for the relief sought, and these should be stated so distinctly and clearly that the respondent may either admit or deny them, so that an issue may be framed on the facts alleged as the foundation for the relator's claim to relief.[3] He must also show, not only that he has no other specific remedy, but that he has a specific right.[4] But, while mandamus is never granted where other adequate, legal remedy exists, it is not absolutely necessary that the petition should state, in so many words, that the relator is without other adequate remedy, if such appears to the court to be the actual fact.[5] The relator must also specify clearly and distinctly the particular act or acts whose performance is sought.[6] And the matter of inducement stated in the alternative writ should include everything necessary to show jurisdiction over the subject of the writ and to warrant its mandate, and these facts should be stated with precision and in an issuable form.[7] The application should also be limited to one cause of action, and distinct rights of different persons can not be joined in the same proceeding.[8]

§ 450 *a*. The right of third persons, not parties to the action, to interplead in proceedings in mandamus rests wholly upon statute, no such right existing at common law. Under a statute authorizing persons other than the original defendants, who may be interested in the subject-matter, to be made defendants and to plead, answer or demur, as if originally joined, the right to interplead is limited to persons who

[1] State *v.* The Governor, 39 Mo. 388.

[2] State *v.* Helmer, 10 Neb. 25.

[3] State *v.* Everett, 52 Mo. 89; People *v.* Glann, 70 Ill. 232; People *v.* Davis, 93 Ill. 133; Lavalle *v.* Soucy, 96 Ill 467.

[4] State *v.* Everett, 52 Mo. 89.

[5] People *v.* Hilliard, 29 Ill. 418.

[6] State *v.* Cavanac, 30 La. An. 237.

[7] State *v.* Sheridan, 43 N. J. L 82.

[8] Haskins *v.* Supervisors, 5: Miss. 496.

may properly be made defendants, and the statute does not warrant the introduction of additional plaintiffs seeking affirmative relief.[1] And in Missouri, it is held that the general provisions of the practice act, authorizing all persons interested in the subject-matter in controversy to be made parties, do not apply to proceedings in mandamus. When, therefore, the action is brought against an officer of a county, the county itself, although interested in the controversy, will not be allowed to interplead.[2]

§ 451. The alternative writ being, as we have seen, in the nature of a declaration at law, it is open to all the modes of pleading applicable to a declaration. Hence its allegations may be traversed, or may be confessed and avoided by alleging facts which go to avoid the effect of the writ, or they may be met by raising questions of law, * 322 upon the facts stated in the writ, by way of demurrer.[3]

And it follows from the general analogy between the pleadings in mandamus and in ordinary actions at law, that a plea taking issue upon immaterial facts, and which neither traverses nor confesses and avoids material allegations, is bad upon demurrer.[4]

§ 452. If the respondent pleads to the merits of the controversy, instead of relying upon facts which he might properly have pleaded in abatement, he thereby waives his plea in abatement. And while the pendency of another suit involving the same subject-matter, would seem to be a good plea in abatement to the alternative writ, yet the respondent can not rely upon such plea, while he at the same time asks judgment of the court upon the merits of the controversy, by setting up facts upon which he relies as showing that a peremptory writ should not be allowed.[5]

§ 453. In California, the courts still adhere to the doctrine

[1] Winstanley v. The People, 92 Ill. 402.

[2] State v. Burkhardt, 59 Mo. 75.

[3] People v. Salomon, 46 Ill. 336.

[4] State v. Eaton, 11 Wis. 29.

[5] Silver v. The People, 45 Ill. 227

that the writ of mandamus is a high prerogative writ, issuing in the name of the sovereign power, and hence * 323 they refuse to entertain a plea in abatement, alleging the pendency of another action involving the same issues raised in the mandamus proceeding.[1] So in proceedings by mandamus to compel the making of a subscription to the stock of a railway company, a plea that proceedings in quo warranto are pending against the persons claiming to compose the company, shows no defense to the action, and will be stricken from the files.[2]

§ 454. It is held that any defects in substance in the alternative writ may be taken advantage of at any time before the granting of the peremptory writ, even after return made.[3] But where, under the practice of a state, proceedings for mandamus are begun by the filing of an information, the object of which is to make known to the court the ground of complaint and to ask the relief sought, such information is not regarded as a pleading to which a demurrer will lie, its purpose being to inform the court of the ground of action.[4]

§ 455. As a matter of convenience to the parties, it is frequently stipulated that the petition or application for the alternative writ may stand in place of the writ itself. In such cases, a motion to quash the petition has the effect of fully presenting for the decision of the court all questions raised by the petition, as well as their sufficiency to entitle the relator to the desired relief. In other words, the petition standing in place of the alternative writ, the motion to quash performs the same office as a general demurrer to the writ, and brings the law of the case fully before the court. It follows, therefore, that all the facts which are well pleaded are admitted by the motion, and the question presented for the determination of the court is, whether enough is shown in

[1] County of Calaveras *v.* Brockway, 30 Cal. 325.

[2] Oroville & Virginia R. Co. *v.* Supervisors of Plumas, 37 Cal. 354.

[3] People *v.* Supervisors of Fulton, 14 Barb. 52.

[4] State *v.* Board of Equalization, 10 Iowa, 157.

the petition to entitle the relator to a peremptory writ.[1] So a motion to set aside and discharge a rule to show cause why a peremptory mandamus should not issue, oper-
* 324 ates as a demurrer, and the statements of the relator in such case are taken as true for the purposes of the motion.[2] And upon such motion, the court will not investigate facts outside of the record.[3]

§ 456. Where the aid of a mandamus is invoked to compel the issuing of a deed of lands sold for unpaid taxes, it is not requisite that the application should state all the facts necessary to show that the proceedings for the collection of the tax were regular, so that the deed, if issued, would avail the party seeking it. It is only necessary, in such case, to state the relator's right and the corresponding duty of the respondent in general terms.[4]

II. The Return to the Alternative Writ.

§ 457. The return defined; common-law remedy by action for false return; effect of statute of Anne.
458. General features of the statute of Anne; statute of William; statute of Victoria.
459. Effect of statute of Anne as to traversing return.
460. Functions of the return and its requisites.
461. Intendment in construing return.
462. When return taken as true.
463. Pleading several matters of defense in return.
464. Great strictness required in returns at common law.
465. Return necessary where respondent obeys the writ; requisites of such return.
466. Two courses open to respondent; direct traverse, and plea in confession and avoidance.
467. General rule as to traversing return; applications of rule to mandamus to municipal corporations.
468. Conclusions of law should not be traversed.

[1] People v. Salomon, 51 Ill. 40.

[2] State v. Common Council of Milwaukee, 20 Wis. 87.

[3] State v. Supervisors of Sheboygan, 20 Wis. 104.

[4] Kidder v. Morse, 26 Vt. 74.

469. Matters of law not traversable need not be stated in return.
470. Rule for testing return by way of traverse.
471. Degree of certainty requisite in return.
472. Argumentative return bad; facts should be stated and not conclusions from facts.
473. Return by way of confession and avoidance; general principle.
474. Degree of precision required; rule applied to mandamus to correct amotion from municipal corporation.
475. Any cause existing at time of return may be shown.
476. Illustrations of rule allowing several consistent defenses to be interposed in return.
477. Return quashed where matters of defense are inconsistent.
478. Return sufficient if certain upon its face; negative pregnant not allowed; rule applied to mandamus against municipal corporations.
479. Return of discretionary powers of public officers against whom writ is granted.
480. Mandamus to municipal corporations and officers, by whom return should be made.
481. Requisites of return to mandamus to correct amotion from corporate office or membership.
482. Pendency of bill for injunction to restrain proceedings in mandamus not a good return.
483. Not duly elected, when a good return to mandamus to restore to office.
484. No money in treasury, when a good return.
485. Record of board of public officers, when taken as return.
486. Return in case of *alias* and *pluries* writ.
487. Return need not be verified by oath of respondent.

§ 457. The return to an alternative writ of mandamus may be defined as the legal statement or * 325 formula by which the respondent answers the writ, showing either a compliance with its mandate, or an excuse for not complying therewith, or that the relator is not entitled to the relief sought. At the common law, and prior to the statute of Anne, no pleadings were allowed in mandamus beyond the return, and the court proceeded to summarily hear and dispose of the application upon the alternative writ and the return, the latter being taken as conclusive. The return not being traversable, the only remedy of the relator in case it proved false, was by an action on the case for a

false return.[1] This remedy, however, he was not at liberty to adopt until judgment had upon the sufficiency of
* 326 the return.[2] To obviate this inconvenience, and for the purpose of obtaining speedier justice, as well as to assimilate the pleadings in mandamus to the ordinary common-law pleadings, the statute 9 Anne, Ch. 20,[3] was enacted, regulating the pleadings in mandamus in all cases relating to municipal corporations and their officers, and by a more recent enactment its provisions were extended to all cases of mandamus.[4]

§ 458. Most of the states of this country have either adopted the substantial provisions of this statute by express legislative enactment, or have recognized its binding force by judicial decisions, and a correct understanding of its provisions is of the highest importance in attempting to delineate the law of mandamus, as it prevails both in England and America. The statute authorizes the person suing or prosecuting any writ of mandamus, in any of the cases therein specified, to plead to or traverse all or any of the material facts contained in the return, to which the respondent may reply, take issue, or demur. Such further proceedings are then to be had, as might have been had at common law if the relator had brought his action on the case for a false return. In case a verdict is found for the relator, or judgment is given for him upon demurrer, or by *nil dicit*, or for want of a replication or other pleading, he is entitled to his damages and costs, and a peremptory writ of mandamus shall issue without delay, as might have been done at common law if the return were adjudged insufficient.[5] The effect

[1] See Enfield *v.* Hall, 1 Lev. part II. 238; Universal Church *v.* Trustees, 6 Ohio, 445; State *v.* Wilmington Bridge Co. 3 Harring. 540; Weber *v.* Zimmerman, 23 Md. 45; Lunt *v.* Davison, 104 Mass. 498; Johnson *v.* The State, 1 Geo. 271.

[2] Enfield *v.* Hall, 1 Lev. Part II, 238.

[3] See Appendix, A.

[4] 1 Wm. 4, Ch. 21.

[5] See Appendix, A. The condition of the pleadings in mandamus, both before and after the statute of Anne, as well as the true con-

of the statute was to assimilate proceedings in manda- * 327
mus to those in ordinary personal actions, and although
it did not abolish the common-law remedy by an action on the case for a false return, it yet rendered this remedy practically obsolete, by substituting in its stead a more expeditious form of procedure, by which complete relief was afforded in one and the same proceeding, without compelling the relator to resort to his collateral remedy by an action for a
false return. Neither the statute of Anne, however, * 328
nor the act of 1 Wm. IV, Ch. 21, extending the provisions of the former act to all cases of mandamus, gave to the relator the right of demurring to the return, in order that the decision of the lower court upon its validity might be reviewed upon writ of error. This defect in the English procedure was supplied by the act of 6 & 7 Vict. Ch.
67, which provides that in all cases in which the rela- * 329
tor desires to question the validity of the return, he
shall do so by demurrer, in like manner as in ordinary personal actions, and upon judgment thereon any party aggrieved is authorized to prosecute a writ of error.[1]

§ 459. It will thus be seen that proceedings in mandamus in England, which at common law were arbitrary, cumbrous and unsatisfactory, have gradually been moulded into uniformity with the proceedings in ordinary personal actions, and are subject to the same general principles, in as far as concerns the pleadings necessary to bring the parties to an issue, and to procure a final determination upon their rights. And in this country, as well as in England, proceedings in mandamus are now usually regarded as in the nature of an action, to which the parties may plead as in other actions. In those states in which the statute of Anne is in force, the return to the alternative writ may be traversed, and this right of traversing the return is regarded as in lieu of the former

struction of this important act, are very lucidly set forth in King *v.* Mayor & Aldermen of London, 3 Barn. & Ad. 255.

[1] See Appendix, B.

action for a false return.[1] But in the absence of statutory authority, allowing a traverse to the return, it would seem that the common-law rule still prevails, where the statute of Anne has not been adopted, and the relator is left to his remedy by action for a false return.[2]

§ 460. The proper function of the return is to
* 330 show, not merely what would be a *prima facie* right in the respondent, in the absence of any allegation to the contrary, but to show a right to refuse obedience to the writ in view of the allegations which it contains, and if it fails to do this it is demurrable.[3] Unless, therefore, the alternative writ is quashed, the respondent is bound to make return, and to set forth either a positive denial of the truth of the allegations contained in the writ, on which the relator founds his claim for relief, or to state other facts sufficient in law to defeat relator's right, since the court has already determined upon the application for the alternative writ, that the facts stated are *prima facie* true, and that they entitle the relator to the relief sought.[4] And, in general, the return should contain positive allegations of facts, and not mere inferences from facts.[5]

§ 461. It would seem that in as far as any presumption or intendment is exercised in construing a return, it should ordinarily be in favor of and not against its sufficiency. And

[1] Johnson *v.* The State, 1 Geo. 271.

[2] Green *v.* African Methodist Society, 1 S. & R. 254; Commonwealth *v.* Commissioners of Lancaster, 6 Binn. 5; Commissioners Court *v.* Tarver, 21 Ala. 661; State *v.* Wilmington Bridge Co. 3 Harring. 540. But see Fitzhugh *v.* Custer, 4 Tex. 391, where it is held that even in the absence of any statute similar to the statute of 9 Anne, Ch. 20 and 1 Wm. IV, Ch. 21, the common-law rule of considering the return conclusive and remitting the relator to his action for a false return, does not prevail, and that the rights of the parties may be determined in one and the same controversy.

[3] State *v.* Lean, 9 Wis. 279.

[4] Levy *v.* Inglish, 4 Ark. 65; Canova *v.* Commissioners, 18 Fla. 512. And see as to the sufficiency of the return, Springfield *v.* County Commissioners, 10 Pick. 59.

[5] Commonwealth *v.* Commissioners of Allegheny, 37 Pa. St. 277; Same *v.* Same, Ib. 237.

the courts will not, for the purpose of invalidating a return, presume possible or even probable facts, which do not appear.[1] Where, however, the return fails to answer * 331 the important facts alleged in the petition, every intendment and presumption will be made against it.[2] But as regards the sufficiency of the return, it is enough that it contains a full and certain answer to all the allegations expressly made, and that it discloses a fair, legal reason why the mandamus should not be obeyed.[3]

§ 462. Where the statute of Anne does not prevail, the return is, in conformity with the common-law rule, to be received as true for the purposes of the case, until proven false in an action for a false return, and if it contain matters sufficient to prevent the granting of the peremptory writ, that writ is refused.[4] And when the relator fails to traverse any of the allegations of the return, they are to be taken as true for the purposes of the application for a peremptory mandamus, the relator only being entitled to the peremptory writ on the ground that he has disproved the truth of the return, just as at common law, when he had established its falsity by an action on the case for a false return.[5] So if the relator does not traverse the return, but moves for a peremptory writ upon the alternative writ and the return, he submits his right to relief upon the facts disclosed in the alternative writ and the return.[6]

§ 463. It is generally competent for the respondent to set forth in his return several distinct and separate defenses, at

[1] Springfield *v.* County Commissioners, 10 Pick. 59. See further, upon the same subject, Brosius *v.* Reuter, 1 Har. & J. 551.

[2] People *v.* Kilduff, 15 Ill. 502.

[3] Springfield *v.* County Commissioners, 10 Pick. 59.

[4] Commonwealth *v.* Commissioners of Lancaster, 6 Binn. 5. And see Commissioners Court *v.* Tarver, 21 Ala. 661; Board of Police *v.* Grant, 17 Miss. 77; Beaman *v.* Board of Police, 42 Miss. 237; Swan *v.* Gray, 44 Miss. 393; Carroll *v.* Board of Police, 28 Miss. 38.

[5] Tucker *v.* Justices of Iredell, 1 Jones, 451; Beard *v.* Supervisors, 51 Miss. 542; Jefferson Co. *v.* Arrghi, 51 Miss. 667.

[6] Beard *v.* Supervisors, 51 Miss. 542; Jefferson Co. *v.* Arrghi, 51 Miss. 667.

his option, provided they are consistent with each other,[1] and if he prevails on either of them, the peremptory writ will be refused.[2] And where the statutes of a state, regulating civil practice and procedure, authorize defendants to plead as many matters as they may think necessary to their defense, the provision is held equally applicable to proceedings in mandamus, and the respondent may, therefore, set up in his return as many separate defenses as he sees fit.[3] It is, however, important that the several defenses relied upon * 332 in the return should be consistent with each other, since, as we shall hereafter see, if they be inconsistent or repugnant, the court may quash the entire return and grant the peremptory writ, even though some of the matters stated might be sufficient as an independent return.[4] Or, it is within the discretion of the court to quash such portions of the return as it may deem insufficient, and to allow the rest to remain.[5]

§ 464. At common law, the utmost strictness was required in returns, and the courts in construing them exacted the highest degree of certainty known to the law. It is not too much to assert, that in no branch of the law was more technical precision required in pleading than in returns to writs of mandamus.[6] The reasons for requiring this strictness may be found in the fact that it was necessary, in order that the party injured might have sufficient ground on which to base

[1] *Ex parte* Selma & Gulf R. Co. 46 Ala. 230; *Ex parte* Candee, 48 Ala. 386. And see Commissioners Court *v.* Tarver, 21 Ala. 661.

[2] *Ex parte* Selma & Gulf R. Co. 46 Ala. 230. And see Regina *v.* Mayor of Norwich, Ld. Raym. 1244.

[3] Commissioners Court *v.* Tarver, 21 Ala. 661.

[4] Regina *v.* Mayor of Norwich, Ld. Raym. 1244; King *v.* Mayor of York, 5 T. R. 66; *Ex parte* Candee 48 Ala. 386.

[5] King *v.* Mayor of Cambridge, 2 T. R. 456.

[6] See Harwood *v.* Marshall, 10 Md. 451; Opinion of HOLT, J., in Rex *v.* Abingdon, 12 Mod. Rep. 401. In Harwood *v.* Marshall, it is said that "there is no branch of the law in which more technical precision and nice discrimination are found, than in the rules which govern the construction of returns to writs of mandamus at common law."

his action for a false return, if it were false, and because the return could not be helped by pleading.[1] And an additional reason may possibly be found in the fact that no intendment was made in favor of the return. Notwithstanding the statute of Anne, the court of kings bench still maintained the rigor of the common-law rule for a considerable period of time, holding that the statute in no manner took away the necessity of strict pleading. And a repugnant and contradictory return is bad, notwithstanding the statute.[2]

§ 465. Since the mandatory clause of the alternative writ always commands the respondent to perform the required act or duty in the alternative, that is, either to perform the act, or to show cause why it should not be done, it is at once obvious that the respondent has his option, either * 333 to question the sufficiency of the writ in law or in fact, or to comply with the mandate of the court and perform the act required. By adopting the latter course, however, the respondent does not necessarily absolve himself from the duty of making return to the alternative writ, and it would seem to be the correct practice in such case to make return that the mandate of the court has been obeyed.[3] Thus, in an early case in the court of kings bench, where a mandamus had been issued to the judge of the prerogative court, to compel the granting of administration, upon a motion to supersede the writ on affidavit that administration had been granted before the writ was taken out, the motion was denied, the court holding that the facts relied upon in support of the motion should be set forth by way of return.[4] Where the respondent yields obedience to the writ, it is sufficient to set forth by way of return a succinct statement of his compliance, following the mandatory clause of the writ, and stating

[1] See opinion of HOLT, J., in Rex v. Abingdon, 12 Mod. Rep. 401.

[2] Queen v. Mayor of Pomfret, 10 Mod. Rep. 107.

[3] See Anon. 1 Barn. K. B. 362; Rex v. Lord of Milverton, 3 Ad. & E. 286, n.

[4] Anon. 1 Barn. K. B. 362.

his performance of the duty as by the writ commanded.[1] And upon mandamus to justices of the peace, to proceed and give judgment in a cause pending before them, it is sufficient to allege, by way of return, that they have heard and determined the matter.[2]

§ 466. If the respondent does not see fit to question the sufficiency of the alternative writ in point of law, either by motion to quash, demurrer, or other appropriate procedure for that purpose, and if he does not elect to obey the mandate of the writ, but desires to contest the application upon its merits, two courses are open to him. First, he may traverse the suggestion or supposal of the alternative writ, the practical effect of which method of procedure is equivalent to a plea of the general issue in ordinary personal actions. Or, secondly, he may plead matter by way of excuse or justification for his refusal to obey the mandate of the court, in which event he places himself in the attitude of a defendant in an ordinary personal action, who interposes a plea by * 334 way of confession and avoidance. And the general principles governing these two generic classes of pleas, as applied in the usual course of proceedings in civil actions, are believed to be equally applicable to returns in mandamus. In either event, the object of the pleadings is to produce a definite issue, upon which the merits of the controversy may be determined, and final judgment rendered. An extended discussion of the principles of pleading governing pleas by way of direct traverse, and in confession and avoidance, would be foreign to the purpose of the present work; and it is only proposed to consider here such principles as have been directly applied in the cases upon mandamus, leaving the reader to pursue a discussion of the more general principles in the various treatises on pleadings at common law, and under the codes of procedure adopted in the different states.

[1] King v. Parish of Lowton, 11 Mod. Rep. 301.

[2] Com. Dig. tit. Mandamus, D. 3.

§ 467. When the respondent desires, in his return, to traverse the suggestion or supposal of the alternative writ, the general rule is, that he should follow the suggestion itself, and if he pursues this in terms substantially as alleged, the traverse will ordinarily be deemed sufficient.[1] It is, however, important to observe that the return should not be in mere general terms, without alleging specifically the facts relied upon. And where the alternative writ is granted to a municipal corporation, commanding the corporate authorities to restore an officer whom they have removed, it is not a sufficient return to allege generally, that the relator has obstinately and voluntarily refused obedience to the orders and regulations made by the municipal authorities, contrary to the duties of his office and to his official oath. Such a return will be considered as too general in its terms to constitute a justification for the removal, and the particular regulations which have been violated should be set forth.[2] And upon similar reasoning, a return of removal for neglect of duty is bad, which fails to set forth the particular instances of neglect relied upon.[3] So upon mandamus to compel the election of a corporate officer, the return should * 335 either deny the right of election mentioned in the alternative writ, or should show an election in accordance therewith, and a return setting up a different right, under which it is alleged the election was held, is insufficient.[4]

§ 468. Another important principle of pleading, applicable in testing the sufficiency of a return by way of traverse to the alternative writ, is, that mere conclusions of law, resulting from statements of fact in the alternative mandamus, can not be traversed.[5] Indeed, the principle as thus stated is but the application of the common-law doctrine with respect

[1] Com. Dig. tit. Mandamus, D. 3; Bac. Abr. tit. Mandamus, I; Rex v. Penrice, Stra. 1235.

[2] King v. Mayor & Burgesses of Doncaster, Ld. Raym. 1565.

[3] Bac. Abr. tit. Mandamus, I.

[4] Rex. v. Corporation of Malden, Ld. Raym. 481.

[5] King v. Mayor of York, 5 T. R. 66; See also Rex v. Liverpool, Burr. 723; Rex v. Mayor of Lyme Regis, Doug. 149.

to traverses generally, that they must be taken upon matters of fact, and not of law. The reason for the rule is found in the fact that a traverse of the law contained in the preceding pleading, constitutes, in effect, an exception to the sufficiency of that pleading in point of law, and is, therefore, properly within the scope of a demurrer, rather than of a traverse.[1] The rule under consideration has been frequently applied in cases of mandamus to municipal corporations. And where, on proceedings to compel municipal authorities to certify the election of an officer, the alternative writ set forth in detail all the proceedings of the election, and concluded with an allegation that, by reason of the premises, the relator was elected to the office, by a majority of the persons present who had a legal right to vote at the election, a return that the relator was not elected to the office, was held bad, as being merely matter of consequence or conclusion, and not properly subject to traverse.[2]

§ 469. Again, it is to be observed that the courts will themselves take notice of such propositions of law as necessarily grow out of the facts alleged in the return, and since matter of law is not ordinarily traversable in pleadings, it need not be alleged in the return. The principle as * 336 here stated, is well illustrated in cases of mandamus to municipal corporations to restore officers who have been removed. And where the law is regarded as clearly settled, that the power of amotion rests in the corporation at large, as a necessary incident to its existence, it is unnecessary to allege in the return the existence of such power, since it is purely a matter of law and hence not traversable.[3]

§ 470. It has been laid down as a test, in considering the sufficiency of a return by way of traverse, to determine whether, if the supposal of the writ be true and if it be suffi-

[1] Steph. Pl. 191.

[2] King v. Mayor of York, 5 T. R. 66.

[3] King v. Mayor of Lyme Regis, Doug. 149.

ciently averred, an action for a false return could be maintained against the respondent. Or, in other words, if the facts averred in the return may, on a strict construction, be true, consistently with the truth of the facts * 337 alleged in the writ, the return has been held vicious.[1]

§ 471. The English courts still adhere to the earlier decisions, to the extent of exacting a considerable degree of particularity in the return, and while it is conceded that the mandatory part of the writ, requiring the performance of the duty which it is sought to coerce, may be in more general terms, it is held that the return should be very minute and particular, in showing why the respondent has not done that which he was commanded to do.[2] Both in England and in this country, however, the rigor of the ancient rule, as to the degree of certainty required, has been somewhat relaxed, and it is now the generally received doctrine that certainty to a certain intent in general is sufficient; that is, such a degree of certainty as upon a fair and reasonable construction may be called certain, without resorting to possible facts which do not appear.[3] And it has been held that the same degree

[1] Harwood *v.* Marshall, 10 Md. 451.

[2] Queen *v.* Southampton, 1 B. & S. 5, opinion of CROMPTON, J.

[3] Per BULLER, J., in King *v.* Mayor of Lyme Regis, Doug. 149; Commonwealth *v.* Commissioners of Allegheny, 37 Pa. St. 277; Society *v.* Commonwealth, 52 Pa. St. 125. In King *v.* Mayor of Lyme Regis, the rule as to the degree of certainty required in the return, is stated by BULLER, J., as follows: "I agree that, in these returns, the same certainty is required as in indictments, or returns to writs of *habeas corpus*. Lord COKE has distinguished certainty in pleading into three sorts: 1. Certainty to a common intent, which is sufficient in a plea in bar; 2. Certainty to a certain intent in general, as in counts, replications, etc., and so in indictments; 3. To a certain intent in every particular, which is necessary in estoppels. The second of those sorts is all that is requisite here, and I take it to mean what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts, which do not appear. * * If the return be certain on the face of it, that is sufficient, and the court can not intend facts inconsistent with it, for the purpose of making it bad. * * If presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return."

tive mandamus had been granted to justices of the peace, to compel them to execute a statute of forcible entry, a return by the justices that they had procured the wrong-doers to be indicted for a forcible entry, was held insufficient, since it constituted no answer to the mandate of the court, and the respondents were ruled to make a further return.[1]

§ 474. It is also incumbent upon the respondent, who seeks to excuse or justify his non-execution of the writ, by a return in the nature of a plea of confession and avoidance, to state the facts relied upon with such precision and certainty, that the court may be fully advised of all the particulars necessary to enable it to pass judgment upon the sufficiency of the return. And upon mandamus to restore members of a common council who had been removed
* 340 from their office, a return that the members of the council were chosen yearly, and that before the coming of the writ they were chosen and continued for a year, at the end of which time they were duly removed from their office by the election of others, was held bad for uncertainty, since it should have shown the precise time of the election.[2] So upon mandamus to restore the relator to the office of capital burgess in a municipal corporation or borough, from which he had been removed, a return alleging as the ground of relator's amotion his non-attendance at a meeting, to which he was called for the election of a capital burgess, with an averment of the right of such election in the capital burgesses, being the common council, was held bad, since it did not allege with sufficient certainty that the common council was composed of all the capital burgesses, and it would be difficult to maintain an action thereon, as for a false return.[3]

§ 475. The alternative writ of mandamus, being itself in the nature of a rule to show cause, any cause which exists at the time fixed for making return or showing cause, is avail-

[1] King v. Long, Barn. K. B. 82.
[2] King v. City of Chester, 5 Mod. 10.
[3] King v. Mayor of Lyme Regis, Doug. 177.

able as an answer to the mandate of the writ. And this principle holds good, even though the issuing and serving of the alternative writ be regarded as the commencement of an action, and any fact which occurs after service of the alternative mandamus, if of such a nature as to constitute a sufficient answer to the mandate of the court, may be set forth in the return by way of defense. Thus, to a mandamus directing a commissioner of highways to open a certain road, it is a sufficient return that since service of the writ the road has been discontinued, by due proceedings at law for that purpose.[1]

§ 476. It has already been shown, that it is competent for the respondent in his return, to allege as many distinct and several matters as he may deem necessary for his defense, provided such matters are not inconsistent with or repugnant to each other.[2] In the application of this principle, questions of much nicety have occurred in determining what matters might properly be included in a return, * 341 without repugnance or inconsistency. Thus, upon mandamus to the mayor and aldermen of a city, to admit and swear one as an alderman, a return alleging that the relator was not duly elected, and that a tribunal authorized to decide upon his election had adjudged it to be void, was held to be a good return, since the matters alleged, although distinct from, were perfectly consistent with each other.[3] So where the mandate of the writ was to admit and swear the relator to a certain office, the writ alleging that he was duly elected, and that he thereby became entitled to be sworn, a return alleging that he was not duly elected, and that he was not entitled to be sworn in, because he had not been previously approved of by the proper authority, was held good, since, there being a duplicity in the writ, there must neces-

[1] People v. Commissioner of Highways, 1 N. Y. Sup. Ct. Rep. 193.

[2] See § 463, *ante*. See also Wright v. Fawcett, Burr. 2041.

[3] Rex v. Mayor and Aldermen of London, 9 B. & C. 1.

sarily be a duplicity in the return.[1] Again, where the alternative writ was granted to restore one to the office of sexton of a parish, and it was returned that he was not duly elected according to the ancient custom, and further, that there was a custom for the inhabitants to remove at pleasure, pursuant to which they had removed the relator, the court held the two matters of defense to be consistent, and sustained the return.[2] So where it was returned to a mandamus to admit one to the office of common councilman, that he was ineligible to the office, and further, that he was not duly
* 342 elected, as by the writ supposed, the allegations were held not inconsistent.[3]

§ 477. If the several matters of defense, relied upon by the respondent in his return, are adjudged to be inconsistent or repugnant, the court will quash the entire return and award a peremptory mandamus.[4] Thus, where a mandamus to compel municipal authorities to certify the election of relator as municipal recorder, alleged that the authorities, being duly assembled on a given day, elected the relator, and the return denied that they were duly assembled on that day for the purpose of an election, and afterwards alleged that they were assembled that day and elected an officer, the matters alleged were held to be so inconsistent with each other as to warrant the court in quashing the entire return.[5] So to a mandamus to admit one to the position of alderman, a return alleging, among other things, that the relator was elected by the ward, but refused by the mayor and aldermen, and alleging further, that he was not elected, was held bad because of repugnancy, because the court was unable to discern which was to be believed, and therefore a peremptory

[1] Wright v. Fawcett, Burr. 2041.

[2] Rex v. Churchwardens of Taunton St. James, Cowp. 413.

[3] King v. Mayor of Cambridge, 2 T. R. 456.

[4] King v. Mayor of York, 5 T. R. 66; opinion of BULLER, J., in Rex v. Mayor of Cambridge, 2 T. R. 456; Regina v. Mayor & Aldermen of Norwich, 2 Salk. 436; Queen v. Mayor of Pomfret, 10 Mod. Rep. 107; *Ex parte* Candee, 48 Ala. 386.

[5] King v. Mayor of York, 5 T R 66.

mandamus was granted.[1] So, too, where the writ commanded the mayor and burgesses of a city to restore a burgess to his position, and the return set forth, first, that the relator was elected and qualified, second, that he was removed for non-attendance, and third, that his election was null and void, the return was adjudged bad, by reason of the repugnant and contradictory matter alleged therein.[2]

§ 478. While, as we have already seen, great strictness was required at common law as to the certainty requisite in a return, it was always sufficient if the return were certain upon its face, and the court would not intend facts inconsistent with it, for the purpose of making it bad.[3] In the earlier English cases, frequent decisions are to be * 343 found where returns were held bad, because of that description of uncertainty known as negative pregnant, that is, such a form of negative assertion as necessarily implied or carried with it an affirmative. For example, upon mandamus to restore one to the office of town clerk, a return *non fuit debito admissus* was held bad, the proper return in such case being *non fuit admissus* generally. And in support of the distinction the court relied upon the fact, that, upon the return as made, the party aggrieved would be deprived of his action on the case for a false return.[4] So a return of *non fuit debito modo electus* was adjudged bad, the proper return being *non fuit electus.*[5] So, too, upon mandamus to a municipal corporation to restore a recorder, the writ alleging that the corporators, being duly assembled, proceeded to the election of a recorder, a return that they were not duly assembled to proceed to the election of a recorder, was held bad as being a negative pregnant, since such a return might mean that they were duly assembled for

[1] Regina *v.* Mayor & Aldermen of Norwich, 2 Salk. 436.

[2] Queen *v.* Mayor of Pomfret, 10 Mod. 107.

[3] Per BULLER, J., in King *v.* Mayor of Lyme Regis, Doug. 149.

[4] Hereford's case, Sid. 209.

[5] Cripp's case, reported with Hereford's case, Sid. 209, 210. And see King *v.* City of Chester, 5 Mod. Rep. 10.

some purpose, though not for the purpose of electing a recorder.[1] It is to be observed generally, however, with reference to the rule against a negative pregnant, that in modern times it has received no very strict construction, and many cases have occurred where the courts, relying upon various grounds of distinction from the general rule, have held that form of pleading to be unobjectionable.[2]

§ 479. In considering the law of mandamus as applicable to public officers entrusted with the performance of duties of a public nature, we have repeatedly seen, throughout the preceding pages, that as to all matters entrusted to or resting in the discretion of such officers, mandamus is never granted, where the effect of the writ would be to interfere with the exercise of such official discretion. It is important, however, to observe, that, notwithstanding this well * 344 established principle, where officers are entrusted by law with the performance of certain duties of a public nature, and are authorized and required to do such matters and things in carrying out their duties as they may from time to time deem necessary, upon mandamus to compel their action, they can not by way of return merely rely upon their discretionary powers and allege that they have done what they deemed necessary, without specifying what they have done. Thus, where commissioners for the improvement of a river, were authorized and required by law to construct such works and to do such things in connection therewith as should "from time to time be deemed necessary, proper, or expedient," upon mandamus to compel the commissioners to put the banks of the river in a state of stability and security, a return that they had done such things as were "from time to time deemed necessary, proper, or expedient," following the words of the statute, was held unintelligible and insufficient, since it failed to show that anything had in fact been done, and the allegations of the return might have been

[1] King v. Mayor of York, 5 T. R. 66.

[2] Steph. Pl. 383.

strictly true, and yet nothing whatever have been done by the commissioners.[1]

§ 480. At common law, a return to a mandamus directed to the officers of a municipal corporation, as * 345 to the mayor and other officers, was good, although not signed by the mayor or attested by the corporate seal, since, if the return was false, an action might be brought against the whole body politic for a false return, and against any particular person for procuring such return to be made.[2] But where the writ is directed to an entire municipal corporation, it should be answered by a majority of the officers, and it is, therefore, insufficient for the mayor to make return without the consent of such majority.[3] In such case, however, the court will not, upon affidavits, examine whether the return of the mayor was actually made with the consent of the requisite majority, but will accept the return and leave the parties aggrieved to their remedy against the mayor, if the return be falsified.[4] And where the alternative writ is directed against a board of municipal officers, such * 346 as county supervisors, they should make return in their corporate and not in their individual capacity. In such case, the return of a single member of the board, or of several members, in his or their individual capacity, can with no more propriety be considered the answer of the board, than could the return of a like number of private citizens. And where one return is filed purporting to be that of the board itself, and another is filed purporting to be that of individual members of the board, the latter will be stricken from the files.[5] So where the writ issues to several officers of a county as a body, the return should be made by them in the same capacity, and if, instead of this, different returns are presented

[1] King v. The Ouze Bank Commissioners, 3 Ad. & E. 544.

[2] Lydston v. Mayor of Exeter, 12 Mod. Rep. 126.

[3] King v. Borough of Abingdon, 12 Mod. Rep. 308.

[4] Rex v. Mayor of Abingdon, 2 Salk. 431.

[5] People v. Supervisors of San-Francisco, 27 Cal. 655.

by different members of the body, which are inconsistent with and repugnant to each other, the proper course is to direct such returns to be withdrawn from the files, and to require the officers to make return as a body.[1] In general, all the parties to whom the alternative writ is directed should make return, and where the writ ran to the aldermen, bailiffs and commonalty of a municipal corporation, but the return was by the bailiffs and capital burgesses, without the commonalty, it was adjudged bad.[2] But where an alternative mandamus is awarded against a board of municipal officers whose term has expired, commanding the performance of an official duty, and the writ is directed to them by name, it is sufficient that the return be made by them as the late officers, showing that they had, while in office, performed the duty required.[3]

§ 481. Upon mandamus to restore one to an office in a municipal corporation, the alternative writ suggesting an amotion by the corporators, or by some of them, a return that the relator was never removed by them, or any of them, is sufficient, even though he may have been removed by their predecessors, since the present officers are not obliged * 347 to show this fact.[4] It is also a sufficient return to the writ commanding the restoration of relator to a corporate office, that he has been restored, even though it be shown to the court that he has been again removed for misdemeanors in office.[5] But it is not a good return to such writ that the relator consented to be turned out of the office.[6] And where the writ issues to restore one to a corporate office, from which he claims to have been wrongfully removed, a return that he was not duly elected, admitted and sworn, is not sufficient, since the material suggestion in the writ is the

[1] McCoy v. Justices of Harnett Co. 4 Jones, 180; State v. McMillan, 8 Jones, 174.

[2] King v. The Baily, 1 Keb. 33.

[3] State v. Griscom, 3 Halst. 136.

[4] King v. Town of Colchester, 2 Keb. 188.

[5] Regina v. Ipswich Corporation, Ld. Raym. 1233.

[6] Regina v. Lane, Ld. Raym. 1304.

removal, and the return should answer, not the words, but the material part of the writ.[1] And in cases of mandamus to compel the restoration of persons who have * 348 been wrongfully removed from the enjoyment of their franchise as members of an incorporated association, the return should show all the facts necessary to the conviction and removal, both as regards the cause of disfranchisement and the mode of proceedings.[2]

§ 482. The fact that the respondent in the proceedings for mandamus has exhibited a bill in equity against the relator, praying an injunction to restrain further proceedings upon the application for the mandamus, which injunction has been refused, can not be taken as a return to the writ, or as sufficient excuse for not making return.[3]

§ 483. Where the alternative writ has been granted to compel the swearing in of two persons, claiming to have been elected as church-wardens, a return that they were not duly elected is bad, unless it shows that neither of them was elected, since the writ should be complied with as far as possible, and if either of the two were duly elected, he should be sworn.[4] But where the writ issues to admit one to the office of church-warden, and contains a recital that he was duly elected thereto, a return that he was not duly elected is a good return, since it is competent for the respondent to deny any material allegation in the writ, and the relator having stated the foundation of his right in the alternative mandamus, this may be denied in the return.[5]

§ 484. It is always a sufficient return to a mandamus to an officer, entrusted with the drawing of warrants or payment

[1] King v. Mayor of Lyme Regis, Doug. 79. And see King v. Harwood, 8 Mod. Rep. 380. But see Rex v. Lambert, 12 Mod. Rep. 2; Queen v. Twitty, 7 Mod. Rep. 83.

[2] Society v. Commonwealth, 52 Pa. St. 125; Commonwealth v. The German Society, 15 Pa. St. 251.

[3] Neuse River Navigation Co. v. Commissioners of New Berne, 6 Jones, 204.

[4] Regina v. Guise, Ld. Raym. 1008. But see Regina v. Twitty, 2 Salk. 434.

[5] King v. Williams, 8 Barn. & Cress. 681.

of claims upon the public treasury for services rendered, that there is no money in the treasury belonging to the fund on which the warrant is to be drawn, or out of which payment is to be made, since the courts will not command the * 349 doing of an act which is beyond the power of the respondent.[1] Nor is such officer required by any rule of pleading to go further in his return, and show why such a state of things exists.[2] But where the writ directs a town officer to levy a tax, to provide funds for the payment of an indebtedness against the town, the fact that there is no money in the treasury constitutes no return to the writ, since its very object is to procure money.[3]

§ 485. Where the writ issues to a board of public officers, such as county commissioners, in case of failure to make return the record of the official proceedings of such board, being produced to the court, may be received as a return and may be acted on accordingly. It would seem, therefore, in such case, that no actual and formal return need be made, the court being otherwise informed of the facts necessary for its action.[4]

§ 486. In case an *alias* and *pluries* mandamus have issued, the return should, in strictness, be to the *pluries*, since the respondent is in contempt for disobeying the two former writs; yet if any damage has resulted therefrom, a return to the original writ may be allowed.[5]

§ 487. It has been held to be unnecessary, in practice, that the return should be verified by the oath of the respondent, since it is taken as true for the purposes of the case, in the absence of any statute allowing it to be traversed, and the party injured must seek his remedy by an action for a false return.[6]

[1] Dodd *v.* Miller, 14 Ind. 433; Hayne *v.* Hood, 1 Rich. N. S. 16; Mitchell *v.* Speer, 39 Geo. 56.

[2] Dodd *v.* Miller, 14 Ind. 433.

[3] Huntington *v.* Smith, 25 Ind. 486.

[4] Street *v.* County Commissioners of Gallatin, Breese, Beecher's edition, 50.

[5] Anon. 11 Mod. Rep. 265.

[6] Commissioners Court *v.* Tarver, 21 Ala. 661.

III. Pleadings Subsequent to the Return.

§ 488. Defective return, how taken advantage of; motion to quash; demurrer.
489. When whole return quashed.
490. Demurrer to return not allowed at common law; nor under statute of Anne; the concilium.
491. Statute of Victoria authorizing demurrer to return.
492. Functions of a demurrer to the return.
493. Demurrer to return carried back to first defective pleading.
494. Demurrer must be interposed in first instance.
495. Rule where the return is good in part and bad in part; demurrer and plea not allowed at the same time.
496. Pleadings which may be interposed to the return; effect of pleading to return.
497. No reply allowed to return under code of procedure.

§ 488. Two available methods are now generally recognized, by which the prosecutor or relator may * 350 take advantage of a defective return, and may test its sufficiency in point of law: the one by motion to quash, the other by demurrer. The former method is usually resorted to only when the return is manifestly bad, by reason of some defect apparent upon its face, or by reason of its containing several matters of defense which are inconsistent with or repugnant to each other.[1] The latter method is adopted where the defects are less obvious, and when it is desired to present the legal objections to the return by a more formal argument.[2] The doctrine of the kings bench would seem to be, that it is discretionary with the court, either to quash the return at once on motion for that purpose, or to have the cause set down for argument.[3] And while the court has the

[1] See King *v.* Mayor of York, 5 T. R. 66; Rex *v.* Mayor of Cambridge, 2 T. R. 456; Regina *v.* Mayor & Aldermen of Norwich, 2 Salk. 436; Queen *v.* Mayor of Pomfret, 10 Mod. Rep. 107

[2] See Silverthorne *v.* Warren R. Co. 4 Vroom, 173.

[3] Per Denman, C. J., in King *v.* St. Katherine Dock Company, 4 Barn. & Ad. 360.

undoubted right to quash the entire return, if the several matters alleged are inconsistent or repugnant, yet if
* 351 there be no inconsistency in the different parts of the return, the court may, in its discretion, quash some portions of it, where it is complicated, and allow the rest to stand for trial.[1] And if the return shows sufficient reason for refusing the relief, although it is evasive and irresponsive in other respects, it should not be quashed as an entirety.[2] Where, however, important questions of law are presented by the return, requiring judicial investigation for their correct solution, the courts will hesitate to dispose of such questions upon a motion to quash the return, and in such case, it is regarded as the better practice to present the questions involved by demurrer to the return.[3] And where a return is presented which is issuable and triable, and is in bar of the remedy sought, it is error to sustain a motion to quash.[4]

§ 489. It would seem, where two causes returned to a mandamus are inconsistent, that the whole must of necessity be quashed, since the court can not know which to believe, and the objection therefore goes to the whole return, the case being regarded as analogous to that of a declaration at common law, in which two inconsistent counts are joined.[5] If, however, the allegations of the return, to which objection is taken on the ground of inconsistency, are merely matters of surplusage, they will not have the effect of vitiating the return. Thus, upon mandamus to restore one to a municipal office, a return by the corporation that the relator had continued in office until the 25th of December, and also that he was removed on the 21st of August, was held not to be repugnant, the contradiction extending only to matter of surplusage, and therefore being immaterial.[6]

[1] Rex v. Mayor of Cambridge, 2 T. R. 456.

[2] Legg v. Mayor of Annapolis, 42 Md. 203.

[3] Silverthorne v. Warren R. Co. 4 Vroom, 173.

[4] School Inspectors v. The People, 20 Ill. 531.

[5] See opinion of BULLER, J., in Rex v. Mayor of Cambridge, 2 T. R. 456.

[6] Lord Hawley's case, Vent. 143.

§ 490. At common law, the prosecutor or relator in proceedings in mandamus could not test the sufficiency of the return to the alternative writ by way of demurrer. Nor was this right given by the statute of Anne,[1] which, although it allowed the relator to plead to or traverse the return, and the respondent to take issue or demur to such plea or traverse, was silent as to the right of demurrer on the part of the relator. This deficiency, or want of any procedure * 852 for testing the legality and sufficiency of the return, other than by motion to quash, seems to have given rise to the practice of allowing the relator, where he desired to dispute the sufficiency of the return, to move for a concilium, and argue the validity of the return in point of law. The motion for the concilium was regarded as in the nature of a demurrer, and the party making the motion occupied substantially the same position as a defendant in a personal action, who demurred to a declaration. Indeed, the concilium would seem to have been merely a device resorted to in order to supply the place of a demurrer, its functions and effect being substantially the same.[2] Such was the condition of the pleadings at common law, as well as under the statute of Anne, the anomaly being presented of the respondent, under that statute, having the right of demurrer, while the relator was denied that right.

§ 491. The method of procedure by the motion for a concilium being attended with many inconveniences, and it being deemed desirable to give the relator the right to test the sufficiency of the return by demurrer, so that the decision of the court below as to such sufficiency might be reviewed on writ of error, a statute was finally enacted in England for the purpose of obviating the inconveniences arising from the

[1] 9 Anne, ch. 20. See Appendix, A. And see Barney v. The State, 42 Md. 480.

[2] King v. Mayor & Aldermen of London, 3 Barn. & Ad. 255. See also King v. Oundle, 1 Ad. & E. 283.

former system of pleading.[1] This statute, after reciting the statute of Anne,[2] and the statute of William IV,[3] extending the provisions of the former act to all cases of mandamus, neither of which statutes, nor any other act, gave the relator the right to demur to the return, enacted that in all cases, where the person prosecuting any writ of mandamus desired to object to the validity of the return, he should do so by way of demurrer, according to the practice and usage in personal actions, and that thereupon the courts should adjudge, either that the return was valid in law, or that it was not valid, or that the writ itself was not valid in law. If the writ was held to be valid, and the return invalid, the * 353 court was required by its judgment to award that a peremptory mandamus should issue, and upon such judgment any party to the record, deeming himself aggrieved thereby, might sue out and prosecute a writ of error, as in ordinary personal actions.[4]

§ 492. A demurrer to the return questions its sufficiency as a defense to the prayer for the relief sought.[5] Its purpose being to test the return as an answer to the allegations of the writ, it is at once obvious that this object can be attained only by assuming all the material allegations of the writ to be true which are neither denied, nor confessed and avoided.[6] And all matters which are sufficiently pleaded in the return, are, for the purpose of the demurrer, admitted to be true.[7] It follows, also, that where the return to the writ is in itself nothing more than a demurrer, and raises no questions of fact, but merely presents questions of law, no demurrer thereto is necessary.[8] Thus, where the return traverses no

[1] 6 & 7 Victoria, ch. lxvii, 83 English Statutes at large, 436. See Appendix, B.

[2] 9 Anne, ch. 20. See Appendix, A.

[3] 1 William IV. ch. 21.

[4] See Appendix, B.

[5] People v. Ohio Grove Town, 51 Ill. 195.

[6] State v. Lean, 9 Wis. 279.

[7] Commonwealth v. Commissioners of Allegheny, 37 Pa. St. 277. Same v. Same, Ib. 237.

[8] People v. Salomon, 46 Ill. 336; People v. Miner, Ib. 387.

fact alleged in the writ, and confesses none except the refusal of the respondent to perform the act required, and alleges in justification of his refusal the unconstitu- * 354 tionality of the law requiring its performance, the whole question involved is fully presented, either with or without a demurrer to the return. And in such case, the court, upon being satisfied of the constitutionality of the law, will grant the peremptory mandamus.[1]

§ 493. The familiar rule of pleading, that a demurrer reaches back to the first fault committed by either party, applies with especial force in cases of mandamus. On demurrer to the return, it is therefore competent for the respondent to avail himself of any material defect in the alternative writ, or in the petition upon which it was granted, the demurrer being carried back to the first defective pleading.[2] And although a return to a mandamus which merely sets up matters of evidence, from which facts may be inferred, is obnoxious to a demurrer, yet if the alter- * 355 native writ is defective in substance, judgment may properly be given for respondents on demurrer to the return, the demurrer going back to the defective writ.[3] So where the alternative writ is defective, in not showing that the act which it is sought to coerce is the specific duty of the officer at whose hands its performance is required, a demurrer to the return will be sustained as a demurrer to the writ itself.[4] And where the relator traverses the return to the alternative writ, and this traverse is demurred to, it is open to the respondent to rely upon any insufficiency in the writ in support of his demurrer.[5] But, after return to the writ and issue tried thereon, the court will not quash the writ upon

[1] People v. Salomon, 46 Ill. 336.

[2] People v. Ransom, 2 N. Y. 490; Commercial Bank v. Canal Commissioners, 10 Wend. 26; State v. McArthur, 23 Wis. 427; State v. Chamber of Commerce, 47 Wis. 670.

[3] Commercial Bank v. Canal Commissioners, 10 Wend. 26.

[4] State v. McArthur, 23 Wis. 427.

[5] Clarke v. Leicestershire & Northamptonshire Union Canal, 6 Ad. & E. N. S. 898.

grounds which might have been urged against making the rule for the mandamus absolute, as that the prosecutor had deceived the court in obtaining the writ.[1]

§ 494. It is important to observe, that the relator, desiring to raise the question of the legal sufficiency of the return, should demur thereto in the first instance, since, by pleading to the return, he admits that the facts which it presents constitute upon their face a sufficient answer to the alternative writ. And by traversing the truth of the return, he is as completely estopped from afterward questioning its sufficiency in law, if the verdict be against him, as he would have been in an action for a false return before the statute of Anne.[2]

§ 495. If the return be bad in part and good in * 356 part, and that portion which is unobjectionable can be separated from that which is defective, a demurrer to the entire return will not be sustained.[3] But, under a statute regulating proceedings in mandamus, which allows the relator to plead to or traverse all or any of the material facts stated in the return, both a demurrer and a plea will not be allowed at the same time. In such case, the whole return is to be considered as an entirety, like a count in a declaration. If, therefore, the facts set forth can not be traversed, the relator should demur, and he will not be allowed to dissect * 357 the return and plead to some portions and demur to the residue.[4]

§ 496. It is competent for the relator, under the statute of Anne, to plead to, or traverse all or any of the material facts alleged in the return. The respondent is then at liberty to reply, take issue or demur, as he may deem best, the pleadings being assimilated as nearly as possible to those in ordinary personal actions at law.[5] The provisions of the

[1] Queen v. Mayor of Stamford, 6 Ad. & E. N. S. 433.

[2] People v. Board of Metropolitan Police, 26 N. Y. 316.

[3] Queen v. Mayor of New Windsor, 7 Ad. & E. N. S. 908.

[4] Vail v. The People, 1 Wend. 38.

[5] See Appendix, A.

statute of Anne, having been re-enacted in many of the states, and having in others been recognized by judicial decisions as of binding force, are believed to be generally applicable in this country, when not abrogated by codes of procedure or other legislation regulating the subject. The effect of pleading to a return is to admit that it constitutes, upon its face, a sufficient answer to the case made by the alternative writ. It follows, therefore, where none of the material facts stated in the return are disproved upon the trial, that respondents are entitled to judgment.[1]

§ 497. Where, under the code of procedure of the state, the pleadings in mandamus are limited to the alternative writ and the answer or return thereto, no reply or pleading will be allowed beyond these, and if such pleading be filed, it may be quashed on application to the court. In such case, the allegations of fact in the return, which are inconsistent with the statements of fact in the writ, will for the purposes of the proceeding, and for forming an issue, be deemed controverted as upon a specific denial, without reply.[2]

[1] People v. Finger, 24 Barb. 341. Ohio St. 599.
[2] State v. Union Township, 9

CHAPTER VIII.

OF THE PRACTICE IN MANDAMUS.

§ 498. Practice widely divergent.
499. Application peremptory at common law; statute of Anne.
500. Practice at common law; rule to show cause.
501. Legislation in England, effect of on practice.
502. Practice in this country.
503. Rule to show cause, in what states adopted.
504. Practice in Wisconsin; rule against several respondents.
505. Mandamus to courts, rule to show cause the better practice.
506. Relator has affirmative on rule to show cause; issue of fact, how tried.
507. Verification of petition; distinction as to private and public prosecutors.
508. Verification by one of several joint relators; omissions not supplied by affidavit on the hearing.
509. Affidavits should not be entitled.
510. Hearing on original papers and return; affidavits excluded.
511. Defect in application, should be taken advantage of in first instance.
512. Decision on application for alternative writ not subject to appeal or writ of error.
513. Writ only issued as a judicial act; time of return.
514. Application should not be entitled; its contents.
515. Courts averse to second application after one refusal.
516. Time of making application.
517. Service of the writ, on whom and how made.
517 *a*. Service upon railway corporation, how made.
518. Costs, generally regulated by statute, or discretionary.
519. Amendments allowed to alternative, but not to peremptory mandamus.
520. Amendment to affidavits; amended return.
521. Motion to quash the alternative writ, nature and effect of.
522. Grounds of motion to quash.
523. Motion to quash, when made.
524. Application may stand in lieu of alternative writ; effect in such case of motion to quash.

525. Return in nature of demurrer, effect of quashing.
526. Form of judgment where relator fails to make out case.
527. Leave to plead over; motion for peremptory writ on pleadings; leave to file amended return.
528. Practice in federal courts.

§ 498. The practice of courts of general common-law jurisdiction, entrusted with the power of * 359 granting writs of mandamus, is so largely regulated by statute and local rules and usages, both in England and in America, that it is a work of great difficulty to deduce from the adjudicated cases any rules of practice not affected by statute and of general application. Indeed, it may be regarded as impossible, even if desirable in a general treatise upon the law of mandamus, to reduce to a harmonious system all questions of practice touching the granting of the writ and its form and contents in so many different sovereignties, differing so widely in the practice and procedure of their courts. And while some general features of the common-law practice are still retained, and some of its general rules applied, in the different states, most questions of practice are largely regulated by local usage or statute. It is these general principles which it is proposed to treat in the present chapter, it being presumed that each practitioner is sufficiently acquainted with the local practice prevailing in his own state, to need no assistance upon these points from a general treatise, even if such assistance were within the scope of this work.

§ 499. As has been shown in discussing the subject of pleadings in mandamus, the application for the peremptory writ, at common law, was a summary proceeding, and was heard upon the return without further pleadings. The statute of Anne,[1] however, authorized the relator to plead to or traverse all or any of the material facts contained in the return, and the usual practice now is to conform to the statute of Anne, in this respect, in the absence of conflicting statutes. Still it is to be observed, that this act did not have the effect

[1] 9 Anne, ch. 20. See Appendix, A.

of abrogating the common-law practice, and the summary method of proceeding may still be adopted.[1]

§ 500. At common law, upon a suggestion under oath, by the party injured, of his own right and the denial thereof, the usual practice was to issue a rule to show cause, * 360 directed to the respondent and requiring him within a certain time to show cause why a writ of mandamus should not issue. If no sufficient cause was shown, the writ itself was then issued, at first in the alternative form, to which the respondent was required to make return by a certain day, unless he chose to perform the act required. If he neither performed the act, nor made return within the time fixed in the alternative writ, the peremptory writ was then issued, commanding him absolutely to do the act in question, and to this writ no other return was allowed than a certificate of obedience to the mandate of the court.[2]

§ 501. By the English common-law procedure act of 1854,[3] the practice and procedure in mandamus cases, in that country, were entirely revolutionized, and most of the ancient and technical learning upon these subjects would seem to have been, to a considerable extent at least, rendered obsolete in England. This statute provides that the plaintiff in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served, a notice to the defendant that he intends to claim a mandamus, and he may thereupon claim in his declaration, together with any other demand which may properly be enforced in the action, or separately, a writ of mandamus commanding the defendant to fulfill any duty, in the performance of which plaintiff is interested. The pleadings and proceedings are assimilated as nearly as possible to those in ordinary actions for the recovery of damages. The mandamus awarded need not recite the declaration or other pro-

[1] People v. President & Trustees of Brooklyn, 13 Wend. 130.

[2] 3 Black. Com. 111.

[3] 17th & 18th Vict. ch. cxxv. See Appendix, C.

ceedings, but simply commands the performance of the duty, and is in other respects similar in form to an ordinary writ of execution, except that it runs to the defendant instead of the sheriff, and may be issued in term or vacation, returnable forthwith. No return is allowed except that of compliance, and the writ thus issued has the same force and effect as a peremptory mandamus out of the queens bench. The statute also provides that upon application by motion to the court of queens bench, the rule may in all cases be * 361 made absolute in the first instance, if the court shall see fit, and the writ may be made returnable forthwith. The provisions of the common-law procedure act of 1852 are also extended, as far as applicable, to the pleadings and proceedings upon a prerogative writ of mandamus out of the queens bench. Such are the leading features of this statute, in as far as relates to practice and procedure, and it may be said to have entirely changed the English law upon this subject.[1] And by the Supreme Court of Judicature act of 1873, the practice in England was still more simplified, it being provided that a mandamus may be granted by an interlocutory order in all cases in which it shall appear just or convenient.[2]

§ 502. The usual practice in this country, in obtaining the alternative writ, is to present to the court a formal application, variously termed a petition, relation or complaint, setting forth in detail the grounds upon which the claim for relief is based and praying the aid of a mandamus. This application is generally verified by oath, or supported by affidavits, and if a *prima facie* case is presented, warranting the relief prayed, the alternative writ issues commanding the respondent forthwith to do the act required, or to show cause why it should not be done. After the granting of the writ three courses are open to the respondent: first, he may do the thing required; second, he may in most of the states

[1] See Appendix, C.

[2] 36 & 37 Victoria, Chap. 66, § 25, Subdivision 8.

demur; and third, he may make return. If he chooses to demur and the demurrer is sustained, the application is of course ended. If his demurrer is overruled, the respondent must then make return, denying the allegations of the writ, or setting up new matter constituting a defense to the relator's claim.[1] And the proceedings are not to be assimilated to proceedings in equity.[2]

§ 503. Instead of issuing the alternative mandamus, as the first process upon the filing of a petition showing a *prima facie* case, the courts in some states have followed the former English practice of granting a rule to show cause. This seems to have been the former practice in New York, where, instead of issuing a mandamus in the first instance, the courts granted a rule to show cause, and the question of the relator's right to the relief sought, was then discussed upon the original papers on which the rule was obtained and the * 362 opposing affidavits.[3] And in Virginia, it was formerly held to be an indispensable prerequisite to the issuing of a mandamus that a rule to show cause should first be granted, although this might be waived by the respondent appearing and making return to the alternative writ.[4] The later doctrine, however, in that state, is that a mandamus *nisi* may issue, without any previous rule to show cause.[5] So

[1] See Swan *v.* Gray, 44 Miss. 393; Keasey *v.* Bricker, 60 Pa. St. 9. See Shrever *v.* Livingston Co. 9 Mo. 195; *Ex parte* Skaggs, 19 Mo. 339. In Illinois, the proper practice is to present the application in the form of a petition, and a mere motion will not suffice. People *v.* Loomis, 94 Ill. 587. As to the practice in the Supreme Court of Illinois, in the exercise of its original jurisdiction in mandamus, see People *v.* Thistlewood, 103 Ill. 139. As to the practice in Alabama, consult *Ex parte* Candee, 48 Ala. 386; Speed *v.* Cocke, 57 Ala. 209. As to the practice in Connecticut, see Cook *v.* Tannar, 40 Conn. 378. And for an extended discussion of the practice and procedure, see Fisher *v.* City of Charleston, 17 West Va. 595; Fisher *v.* Mayor, 17 West Va. 628.

[2] Keasey *v.* Bricker, 60 Pa. St. 9.

[3] See Commercial Bank *v.* Canal Commissioners, 10 Wend. 25; People *v.* Judges of Washington, 1 Caine's Rep. 511.

[4] Dinwiddie Justices *v.* Chesterfield Justices, 5 Call, 556.

[5] Sights *v.* Yarnalls, 12 Grat. 292.

in West Virginia, it is held that the court may award the alternative writ upon the filing of the petition, without any previous rule to show cause.[1] And in Texas, it is held that no rule to show cause is necessary, the alternative writ itself being regarded as the equivalent of a rule to show cause why the peremptory writ should not issue.[2]

§ 504. In Wisconsin, it is held to be correct practice, either to apply to the court in the first instance for an alternative mandamus, or to ask for a rule to show cause why the peremptory writ should not issue, although a preference is expressed for the former course. If, however, the latter course is adopted, the rule to show cause, if no issue of fact is tendered, serves the same purpose and performs the same functions as the alternative writ.[3] But the practice of moving for several writs of mandamus upon one and the same rule to show cause, is regarded as improper, and but one writ should issue on such rule. The fact, however, that too much is asked in the rule does not necessarily warrant the court in discharging it, and if the rule has been entered against several parties, against whom different writs are asked, a peremptory mandamus may be allowed as to one and refused as to the others. But the rule would seem to be otherwise where the relator proceeds by an alternative writ in the first instance,[4] or where the application is made against two public officers jointly.[5]

§ 505. When the aid of a mandamus is sought against inferior courts, the better practice would seem to be to apply for the rule to show cause and to allow a hear- * 363 ing upon the motion, in order that the parties in interest may have a full opportunity of being heard.[6] But if,

[1] Fisher v. Mayor, 17 West. Va. 628.

[2] Murphy v. Wentworth, 36 Tex. 147.

[3] Attorney General v. Lum, 2 Wis. 507; Schend v. St. George's Society, 49 Wis. 237.

[4] State v. Supervisors of Beloit, 20 Wis. 79.

[5] People v. Yates, 40 Ill. 126.

[6] *Ex parte* Garland, 42 Ala. 559. And see this case as to the general practice in granting writs of mandamus and rules to show cause.

upon the return of a rule to show cause why a mandamus should not issue, to compel the judges of an inferior court to sign a particular bill of exceptions, it is shown that the bill as presented was not true, the rule will be discharged and the case remitted, in order that the relator may apply for a mandamus requiring the judges to sign a bill of exceptions, or show cause.[1] And if the object and purpose of the rule are not stated with sufficient clearness to apprise the respondent of the actual thing sought, the court will vacate the rule.[2]

§ 506. Upon the argument of the motion for a mandamus, upon a rule to show cause, the relator, being the moving party, properly has the affirmative, and if the respondent has been heard in opposition to the motion, counsel for the relator may be again heard in reply.[3] But if the cause shown against issuing the alternative writ presents an issue of fact upon a material point, such issue should not be tried upon affidavits, but the court should award an alternative mandamus, to the end that after return thereto the issue may be regularly tried.[4]

§ 507. As regards the verification, by affidavit or otherwise, of the application for a mandamus, a distinction was early taken by the kings bench, between cases where the writ was sought in a matter of right, and where it was based upon a supposed failure of duty, and while in the former class of cases it was held that an affidavit was not required, in the latter class the court would not proceed unless the facts were verified by affidavit.[5] In this country, the English rule requiring the application to be supported by affidavits has not been very strictly adhered to, although it is held that the petition or application for the writ, must contain a

[1] State *v.* Todd, 4 Ohio, 351.

[2] Houston *v.* The Levy Court, 5 Harring. 15.

[3] People *v.* Throop, 12 Wend. 184, note; People *v.* Treasurer of Wayne Co. 8 Mich. 392.

[4] Schend *v.* St. George's Society, 49 Wis. 237. See also State *v.* Mayor of Manitowoc, 52 Wis. 423.

[5] Queen *v.* Cory, 3 Salk. 230.

statement of all the facts necessary to entitle the injured party to the relief sought, and that these facts should be verified in some form.[1] And when the petition is required to be sworn, the omission of the affidavit is fatal to the proceeding.[2] So a verification upon information and belief has been held insufficient to warrant the relief.[3] But a verification in the ordinary form of a jurat to an affidavit has been held sufficient.[4] And when the application is based upon the failure of duty on the part of the authorities of a municipal corporation, if the facts set forth are not verified by jurat or otherwise, the writ will be refused, * 364 even though the facts alleged are sufficient to make a case requiring the aid of a mandamus.[5] But while it may be necessary, in the case of a private relator seeking the extraordinary aid of a mandamus, to disclose by affidavit the essential facts on which he relies for relief, yet the rule is otherwise when the writ is invoked by the public prosecutor, in behalf of the public. And when the proceedings are instituted by the attorney general, to secure the performance of a public duty, he need only suggest to the court the non-performance of the public right and demand the writ to compel its performance, without verifying his application by affidavit.[6]

§ 508. When the petition for mandamus is made by several relators jointly seeking relief, it is competent for any one of the number to make the affidavit verifying the allegations of the petition, and in such case the omission of the other relators to join in the affidavit is not a fatal objection to the proceedings.[7] But when the relator has omitted in the alternative writ important allegations of fact necessary to entitle him to the relief sought, he will not be allowed

[1] People v. City of Chicago, 25 Ill. 483.

[2] State v. Police Jury, 33 La. An. 29.

[3] State v. School District No. 3, 8 Neb. 98.

[4] State v. Wright, 10 Nev. 167.

[5] People v. City of Chicago, 25 Ill. 483.

[6] State v. Wilmington Bridge Co. 3 Harring. 312.

[7] Cannon v. Janvier, 3 Houst. 27.

upon the return of a rule to show cause why a mandamus should not issue, to compel the judges of an inferior court to sign a particular bill of exceptions, it is shown that the bill as presented was not true, the rule will be discharged and the case remitted, in order that the relator may apply for a mandamus requiring the judges to sign a bill of exceptions, or show cause.[1] And if the object and purpose of the rule are not stated with sufficient clearness to apprise the respondent of the actual thing sought, the court will vacate the rule.[2]

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[2] Houston v. The Levy Court, 5 Harring. 15.

[3] People v. Throop, 12 Wend. 184, note; People v. Treasurer of Wayne Co. 8 Mich. 392.

[4] Schend v. St. Geor[illegible]iety, 49 Wis. 237. See [illegible] v. Mayor of Manitowoc[illegible]423.

[5] Queen v. Cory, 3[illegible]

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[2] State v. Police Jury, 33 La. An. 29.

[3] State v. School District No. 3, 8 Neb. 98.

[4] State v. Wright, 10 Nev. 167.

[5] People v. City of Chicago, 25 Ill. 483.

[6] State v. Wilmington Bridge Co. 3 Harring. 312.

[7] Cannon v. Janvier, 3 Houst. 27.

upon the hearing to supply the omission by the affidavit or application on which the alternative writ was granted.[1]

§ 509. In conformity with the English rule, it is held that affidavits upon which an application for a manda-
* 365 mus is based, should not be entitled, since there is no cause yet pending. Thus, when it is sought by mandamus to compel an inferior court to give judgment in a cause then pending before such court, the affidavits in support of the application should not be entitled, as there is yet no cause pending in the court to which the application is made, and an indictment for perjury would therefore fail, since it could not be shown that such a cause then existed in the court in which the affidavit was made.[2]

§ 510. Upon the hearing of the application for the writ, after return made, the proper practice is to act only upon the original papers and the return, and affidavits in behalf of the relators which are intended as a replication to the return are not admissible. The objection to receiving such affidavits is that they might contain new matter, which respondents should be permitted to answer, and the proceedings might thus be prolonged indefinitely.[3] And when the case is heard upon the alternative writ and the return, affidavits upon which the alternative writ was issued will not be considered.[4]

§ 511. Where the respondent desires to take advantage of any defect in the notice of the application for a mandamus, he should do so in the first instance, since by making return to the writ he thereby waives all defects in the original notice, and can not afterward take advantage thereof.[5] And when the alternative writ is granted after argument and upon notice and depositions taken under the order of the

[1] McKenzie v. Ruth, 22 Ohio St. 371.

[2] Haight v. Turner, 2 Johns. Rep. 371; People v. Tioga Common Pleas, 1 Wend. 291. See *Ex parte* La Farge, 6 Cow. 61.

[3] People v. Corporation of Brooklyn, 1 Wend. 318.

[4] People v. Supervisors of Sullivan Co. 56 N. Y. 249.

[5] People v. City of Cairo, 50 Ill. 159; McBane v. The People, Ib. 505.

court, a motion to quash the writ as improvidently granted will not be entertained.[1]

§ 512. We have elsewhere seen, that at common law a writ of error would not lie to the judgment of an inferior court awarding or refusing a peremptory mandamus, but that in England and in most of the states of this country the old rule has been departed from, and writs of error are allowed. But as to the decisions of inferior courts granting or refusing the alternative writ, the better considered doctrine is, that no writ of error or appeal will lie, the judgment of the court being in no sense a final judgment upon a question of right between the parties.[2] And to warrant an appeal there must be a final judgment in favor of the relator and awarding the writ, or a final judgment in favor of respondent and dismissing the petition; and no such final judgment being shown an appeal will be dismissed.[3] So when it is ordered that a peremptory mandamus issue, with liberty to the relator to take issue upon the allegations of the return, no appeal will be allowed from such order, since it does not determine the action.[4]

§ 513. Since the power of issuing writs of mandamus is one which pertains to the court itself, as a * 366 judicial act, the alternative writ can not properly be issued by a clerk of court without an order of the court therefor. And a reasonable time should be allowed by the court within which to make return, and the clerk should not

[1] State *v.* Pennsylvania R. Co. 41 N. J. L. 250.

[2] Shrever *v.* Livingston Co. 9 Mo. 195; *Ex parte* Skaggs, 19 Mo. 339. See also People *v.* Fairman, 91 N. Y. 385. But in some of the states an order of a court of record refusing to award an alternative mandamus, is treated as a final order which may be reviewed by an appellate court. *Ex parte* Morris, 11 Grat. 292. And see Etheridge *v.* Hall, 7 Port. 47. In Ohio, it is held that the refusal to grant the alternative writ is not reviewable upon writ of error from the Supreme Court, and that the remedy in such case is to apply to the Supreme Court for the writ. State *v.* Cappeller, 37 Ohio St. 121.

[3] Watts *v.* President, 46 Md. 500.

[4] People *v.* Clyde, 69 N. Y. 603.

be allowed to fix such time in his own discretion.[1] If sued out in vacation, it has been held that the writ should be made returnable to the next term of the court, and that it was error to make it returnable at chambers, and to hear and determine the case at chambers and grant the peremptory writ upon such hearing.[2] Being an extraordinary remedy, however, and one which issues only when the ordinary process of the courts would prove unavailing, it would seem to be competent for the court to make it returnable according to the necessities of the particular case. And in the absence of any rule fixing the time for the return, it is left to the discretion and judgment of the court awarding the writ.[3]

§ 514. We have already seen that the affidavits, upon which the application for a mandamus is based, should not be entitled, and the same rule applies to the application or relation itself, which should simply be addressed to the court to which it is presented, without being entitled in any cause, since the proceedings at this stage are merely *ex parte*.[4] An objection, however, on the ground that the application is entitled, being merely formal, should be taken *in limine*. The application or relation should state facts, and not mere evidence or legal conclusions from facts. And matters of which the court will take judicial notice, or which would properly appear by way of defense, need not be stated, but it should always appear that the inferior tribunal or officer against whom the writ is sought is legally required to perform the desired act.[5]

§ 515. When the application has once been made * 367 and refused, the courts are exceedingly averse to granting the writ upon a subsequent application, holding that the parties should come prepared with proper materials in the first instance.[6] And when a mandamus is

[1] People *v.* Brooks, 57 Ill. 142.

[2] Murphy *v.* Wentworth, 36 Tex. 147.

[3] State *v.* Jones, 1 Ired. 129.

[4] Chance *v.* Temple, 1 Iowa, 179.

And see Price *v.* Harned, Ib. 473.

[5] Chance *v.* Temple, 1 Iowa, 179.

[6] Queen *v.* Pickles, 8 Ad. & E. N. S. 599, note b.

refused, on the ground of want of demand and refusal to perform the act sought, it is held that the writ will not be granted on a new application, even though it show a demand and virtual refusal, since the former application was denied.[1] But it is held that the objection for want of demand and refusal, should be taken at the outset of the argument upon the rule to show cause, and that it will not avail at a later stage of the proceedings,[2] or upon an appeal from a judgment awarding the peremptory writ.[3]

§ 516. As regards the time when the application should be made, it is believed to be the usual practice under the statutes of most of the states, to entertain applications for the alternative writ at any time, either in term or in vacation. In Alabama, however, it is held that, in the absence of statute regulations upon the subject, the application should be made to the court only in term time, and that it is improperly made to a judge in vacation.[4]

§ 517. Service of the alternative writ is usually made upon the person or officer who is to perform the required act, or whose duty it is to make return. In the case of municipal corporations, the practice was early established of delivering the writ to the mayor, as being the "most visible part" of the corporation.[5] And in mandamus to a board of county supervisors, the original writ should be delivered to the chairman of such board, and a copy should be delivered to each of the other members.[6] And acceptance of service by a clerk of such board, although stated to be "by order of the board," is insufficient.[7] As regards the manner

[1] *Ex parte* Thompson, 6 Ad. & E. N. S. 721.

[2] Queen *v.* Gamble, 3 Per. & Dav. 128, note d.

[3] City of Chicago *v.* Sansum, 87 Ill. 182.

[4] *Ex parte* Grant, 6 Ala. 91. As to the power to issue the writ in vacation in Colorado, see People *v.* Trustees of Ouray, 4 Col. 291.

[5] Queen *v.* Chapman, 6 Mod. Rep. 152; King *v.* Mayor of Exeter, 12 Mod. Rep. 251.

[6] State *v.* Supervisors of Mineral Point, 22 Wis. 396.

[7] Downs *v.* Supervisors, 4 Bissell, 508.

of serving the alternative writ or the rule to show cause, it would seem, in the absence of any imperative statute requiring personal service, that such service is not absolutely necessary before granting the peremptory writ, except to lay the foundation for proceedings in attachment for contempt * 368 in violating the writ.[1] And after the respondent has made return to the alternative writ upon the merits, he can not set up as a further return that he was not served with any notice of the proceeding, other than the alternative writ.[2] Nor is it necessary, for the purposes of awarding the peremptory writ or an attachment for contempt in violating it, that the alternative mandamus should have been served by an officer of the court, duly authorized to serve process, it being regarded more in the nature of an ordinary rule, which may be served by an attorney or other person.[3] And it has been held that service by delivering a copy, at the same time producing the original, was good.[4] And service by delivering a copy of the original writ will not be set aside, because the original was not served and was not shown to the person on whom service was made.[5] But it has been held that service by reading or merely offering to read the writ to the respondent, the officer retaining the writ on which to make his return, like an ordinary process, was insufficient.[6]

§ 517 *a*. When the writ is sought to compel the performance of a duty by a railway company it should be directed to the corporation as such, and should be served upon the officers of the corporation who have the power and whose duty it is to execute it, and against whom an attachment might issue, if necessary, to enforce obedience to the mandate of the court.[7] If the writ is directed to a foreign corporation, such as a railway company, engaged in business

[1] State *v.* Jones, 1 Ired. 129.

[2] Edwards *v.* United States, 103 U. S. 471.

[3] People *v.* Pearson, 3 Scam. 274.

[4] St. Louis County Court *v.* Sparks, 10 Mo. 118.

[5] Queen *v.* Birmingham etc. R. Co. 1 El. & Bl. 293.

[6] Ladue *v.* Spalding, 17 Mo. 159.

[7] State *v.* Pennsylvania R. Co. 41 N. J. L. 250; S. C. 42 N. J. L. 490.

in the state, to enforce a duty growing out of such business, it may be served upon any officer of the corporation within the state upon whom service could have been made at common law upon a domestic corporation. In other words, the service should be upon the chief officer of the corporation, or upon that select body within it whose province it is to put in motion the machinery necessary to the performance of the duty in question, or upon such superior officer as would be expected to execute the order.[1]

§ 518. Questions of costs, in granting or withholding relief by mandamus, are usually regulated by statute, or left to be determined by the discretion of the court, and are hence not susceptible of being regulated or determined by fixed and definite rules. Where the application for the mandamus is merely *ex parte*, it would seem that costs should not follow its denial. But where notice of the motion is given to the adverse party, which he opposes, and the law is so plainly against the relator that the application is denied, costs may be awarded against him.[2] And under a statute providing that, unless otherwise directed by law or by the court, costs shall follow the event of every action, it is held that proceedings in mandamus are not to be excepted from the general rule, and are governed by the statute.[3] If, however, it appears from the return to the alternative writ, that the respondent did not intend any evasion of duty, and that he has fully complied with the requirements of the writ, it is proper to dismiss the proceedings without costs.[4]

[1] State *v.* Pennsylvania R. Co. 42 N. J. L. 490. In Nevada, it is held that when the proceeding is instituted against a board of trustees of a corporation, while it would seem to be the better practice to serve each individual trustee, yet service upon the president of the board is sufficient. State *v.* Wright, 10 Nev. 167.

[2] *Ex parte* Root, 4 Cow. 548. And see People *v.* Supervisors of Columbia, 5 Cow. 291.

[3] Fox *v.* Whitney, 32 N. H. 408.

[4] State *v.* Bonnifield, 10 Nev. 401. As to the effect of a judgment for costs separate from that awarding the peremptory writ, see State *v.* County Clerk of Manitowoc Co. 48 Wis. 112. See as to costs, in South Carolina, State *v.* County Treasurer, 10 Rich. N. S. 40.

§ 519. In the matter of amendments, there would * 369 seem to be no reason why proceedings in mandamus should not be governed by the same rules which prevail in the case of ordinary legal remedies. And the alternative writ may be altered or amended so as to preserve the symmetry of the proceedings, and to make it conformable thereto.[1] The courts will not, however, ordinarily permit the peremptory writ to be amended, but if it demands more than the relator is entitled to under his alternative writ, it may be set aside, and the relator may amend the alternative writ and then be entitled to a peremptory mandamus.[2]

§ 520. The doctrine is regarded as well settled in England, that when the rule for the alternative writ has been discharged, because of defects in the affidavit on which the application was based, it can not afterwards be granted upon an amendment to the affidavit, the only recognized exceptions to the rule being in cases where the amendment is merely in matter of form, as in the title of the cause or the jurat.[3] But when the return is so defective that a demurrer thereto would have been sustained, but instead of demurring a material issue has been joined and tried by a jury, leave may be allowed to file an amended return.[4]

§ 521. Since the issuing of an alternative mandamus, upon an *ex parte* application, is not at all conclusive upon the real merits of the controversy, or the sufficiency of the application, it follows that the respondent should be allowed an opportunity of testing the sufficiency of the alternative writ, or of the application therefor, before being compelled to make return. Such an opportunity is usually afforded by a motion to quash the alternative mandamus, which may be grounded either upon defects in substance, or in form. The

[1] State *v.* Acting Board of Aldermen, 1 Rich. N. S. 30; State *v.* Gibbs, 13 Fla. 55; United States *v.* Union Pacific R. Co. 4 Dillon, 479.

[2] Commissioners of Columbia *v.* King, 13 Fla. 451.

[3] Queen *v.* Great Western R. Co. 5 Ad. & E. N. S. 597.

[4] State *v.* School Land Commissioners, 9 Wis. 200.

motion to quash in mandamus cases, performs the functions of a demurrer to a declaration in an ordinary action at common law, and it is regarded as the appropriate means of testing the sufficiency of the application.[1] And it is * 370 held that the respondent is not bound to present his objections to the writ by return, but may in lieu thereof raise all objections by a motion to quash the alternative writ, and upon this motion he is always entitled to be heard.[2] If the motion to quash is overruled, the proper practice is to allow the respondent, if he desires, further time to make return.[3] If the motion is sustained, leave may be * 371 given to amend.[4]

§ 522. Any variance in substance between the order of the court and the terms of the alternative writ, by which the character of the act to be performed is changed, constitutes such a defect as may be taken advantage of by a motion to quash.[5] And in general it may be said that since it is incumbent upon the relator to show a clear right to the relief before it is awarded, a motion to quash the alternative mandamus will be sustained when he fails to show such right.[6] So if the alternative writ, as well as the petition on which it is granted, is defective in substance, a motion to quash will be sustained.[7] But in Iowa, it is held that when it appears from the petition that the relator has a plain and adequate remedy in another form of action, the objection should be raised by demurrer, and not by motion to dismiss the action.[8]

§ 523. Under the English practice, all objections to the alternative writ, *in limine*, should be raised by motion to

[1] State *v.* Lean, 9 Wis. 279.

[2] Harwood *v.* Marshall, 10 Md. 451.

[3] State *v.* Lean, 9 Wis. 279.

[4] State *v.* Hastings, 10 Wis. 518. See State *v.* Elwood, 11 Wis. 17; State *v.* Slaven, Ib. 153.

[5] Hawkins *v.* More, 3 Ark. 345.

[6] State *v.* Hastings, 10 Wis. 518; State *v.* Elwood, 11 Wis. 17; State *v.* Slaven, Ib. 153.

[7] McCoy *v.* Justices of Harnett, 5 Jones, 265.

[8] Meyer *v.* County of Dubuque, 43 Iowa, 592.

quash, before return made, and by making return the respondent is usually precluded from raising any objections to the writ itself.[1] And after return made and issue tried thereon, the courts will not quash the writ upon grounds which might properly have been urged against making the rule for the mandamus absolute, as that the prosecutor had deceived the court in obtaining the writ.[2] In this country, the tendency has been toward a less stringent practice, and it is held that a motion to quash for defects in substance will lie, even after return made.[3] But as regards objections of a merely formal and technical nature, the English practice still prevails, and it is held that all such objections should be urged by motion to quash in the first stage of the proceedings, and they will not be allowed to prevail after return.[4]

§ 524. As a matter of convenience, it is frequently stipulated by counsel, that the petition or application for the alternative mandamus shall stand for the writ itself. * 372 In such cases, a motion to quash has the effect of fully presenting to the court for its decision the questions raised by the application, and whether it shows a right to the relief sought. In other words, the motion to quash performs in such case the functions of a demurrer, and brings the law of the case fully before the court. All the facts which are sufficiently pleaded are admitted by the motion, and the principal question presented is, whether enough is shown in the petition or application to entitle the relator to a peremptory mandamus.[5]

§ 525. Where the return to the alternative writ specifies and sets out in detail the objections to granting the relief sought, such objections being in the nature of a demurrer to the writ, the effect of quashing that portion of the return is regarded as equivalent to overruling a demurrer to the alter-

[1] King v. Mayor of York, 5 T. R. 66.

[2] Queen v. Mayor of Stamford, 6 Ad. & E. N. S. 433.

[3] Hawkins v. More, 3 Ark. 345.

[4] Fuller v. Trustees, 6 Conn. 532.

[5] People v. Salomon, 51 Ill. 40.

native writ, and although such practice is deemed irregular, the court may treat the questions presented as arising on demurrer.[1]

§ 526. As to the form of entering judgment, when the relator fails to make out a case entitling him to the peremptory writ, it is held to be the proper practice to enter the judgment that the respondent go without day, and that he recover of the relator his costs. And it is improper, in such case, to enter judgment that the writ be quashed, since such judgment is only appropriate when the petition does not disclose a case coming within the legitimate scope of the writ of mandamus, or when it is informal or defective.[2]

§ 527. Where exceptions to the return are overruled and the relator asks leave to plead over, his motion should be granted, the proceedings being assimilated as nearly as possible to pleadings in ordinary actions.[3] And where, upon return or answer, the relator moves for a peremptory writ upon the pleadings, the effect of such motion is the same as a demurrer to the return for not stating facts sufficient to constitute a defense.[4] So when respondent submits affidavits in opposition to the motion for the peremptory writ, and the relator proceeds to argue and submit the motion without submitting further papers, such practice is equivalent to a demurrer to the facts averred by the respondent.[5] But, while the relator is entitled to the benefit of all admissions contained in the return, if the case is brought to argument upon the alternative writ and the return, he can * 373 not insist upon facts alleged in his petition for the mandamus, or in the accompanying affidavits.[6]

§ 528. The practice in the United States courts in cases

[1] County Court of Madison v. The People, 58 Ill. 456. As to the practice upon a frivolous and sham return, see People v. Board of Supervisors, 45 Cal. 395.

[2] Tucker v. Justices of Iredell, 1 Jones, 451.

[3] State v. Jones, 10 Iowa, 65.

[4] People v. Supervisors of San Francisco, 27 Cal. 655.

[5] People v. Fairman, 91 N. Y. 385.

[6] People v. Commissioner of State Land Office, 19 Mich. 470.

of mandamus, prior to the act of congress of June 1, 1872,[1] was substantially identical with the practice at common law. That act provided that the circuit and district courts of the United States, in other than equity and admiralty causes, shall conform as near as may be in their practice and pleadings to the practice in the state courts where they are situated. The effect of this statute, upon the practice in cases where the jurisdiction by mandamus is exercised by these courts, as ancillary to their existing jurisdiction conferred by law, does not seem to have been settled by any direct adjudication. It is held, however, that this act does not apply to proceedings by mandamus in the federal courts in case of a special jurisdiction, created and conferred by a special act of congress for that purpose, as under the act of March 3, 1873,[2] which provides that the proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railway Company to operate its road as required by law. And in cases arising under this statute, the courts will still be governed by the rules of practice prevailing at common law.[3]

[1] 16 Statutes at Large, 197.
[2] 17 Statutes at Large, 509.
[3] United States v. Union Pacific R. Co. 2 Dill. 527.

CHAPTER IX.

OF THE ALTERNATIVE WRIT.

§ 529. Distinction between alternative and peremptory writs.
530. General nature of the alternative writ.
531. Origin of term mandamus; writ bears name of state or sovereign.
532. Form of writ; distinction as to the discretionary nature of act required.
533. Form of mandamus to courts to act on matters within their judgment.
534. The same as to ministerial duties of court.
535. Form of writ to compel auditing of demands against municipality.
536. General principles as to contents of alternative writ.
537. The same; must show clear right; facts necessary.
538. Writ must correspond with order of court; defects in substance, how taken advantage of.
539. Mandatory clause; great strictness required; general requisites.
540. Absence of other legal remedy need not be alleged.
541. Alternative writ must follow rule to show cause.
542. Direction of the writ; general rule; rule where two persons may do the act.
543. Direction to municipal corporation.
544. Direction to courts.
545. Direction to private corporation, where inspection of books is sought.
546. Conclusion in the alternative; omission not fatal; defects not supplied from return.

§ 529. Writs of mandamus as employed in the
* 374 courts of England and of this country, are divided into two general classes, whose distinguishing features are clearly marked and universally recognized. These are the alternative and the peremptory writ, which sustain toward each other a relation somewhat akin to that of original and final process in an ordinary action at law. The chief points of difference between these two writs, or rather forms of the

merely nominal, since the writ is generally considered as a civil remedy.[1]

§ 532. An important distinction is to be observed as regards the form of the alternative mandamus, between cases where it is granted to compel the performance of a plain and unmistakable official duty, ministerial in its nature and involving the exercise of no official judgment, and cases where it issues to public officers merely to set them in * 377 motion, and to compel them to act upon matters resting within their discretion. And while, in the former class of cases, it is proper for the writ to designate specifically the precise act or thing whose performance is required, in the latter class the writ should run in general terms, merely commanding the officers to act upon the matter in question, without directing them to act in any particular manner, or to reach any given result.[2]

§ 533. The principle just considered applies with equal force in determining upon the form of the writ when granted against subordinate courts, for the purpose of setting them in motion. And where the writ issues to compel a subordinate court to act upon some matter properly within its jurisdiction, it will not, in terms, prescribe the nature of the judgment to be rendered, or the party in whose favor the court shall decide, but will merely command the court to proceed and determine the matter in controversy, leaving it to render such judgment as it may deem just.[3] So where the writ is granted against the judge of an inferior court, to procure the signing of a bill of exceptions, it should in no event command him, in terms, to sign a bill absolutely as presented, but only to sign it after being duly settled, leaving the discretion of the judge untrammeled as to what the contents of

[1] Brower v. O'Brien, 2 Ind. 423.

[2] People v. Supervisors of Dutchess, 1 Hill, 50; Humboldt Co. v. County Commissioners of Churchill, 6 Nev. 30; People v. Brennan, 39 Barb. 651.

[3] Life & Fire Insurance Co. v. Adams, 9 Pet. 573.

the bill shall be.[1] So, too, where the aid of mandamus is sought to compel an inferior court to approve the sureties upon an official bond, it is regarded as the correct practice to so frame the alternative writ as to direct the court to proceed and act upon the application, and to hear evidence offered as to the sufficiency of the sureties, and to approve them if sufficient.[2]

§ 534. Where, however, the aid of mandamus is invoked to compel a court to perform an act of a ministerial nature, concerning which it is vested with no discretionary powers, there would seem to be no impropriety in the alternative writ containing a direct and formal command to the court to do the particular thing required. Thus, where a * 378 subordinate court has no power by law to set aside verdicts, or to grant new trials, and it is its plain duty to enter judgment upon a verdict rendered, it is proper for the writ to command the court in positive terms to enter the judgment.[3] So where the signing of judgment is, under the laws of a state, a necessary and absolute duty on the part of the judge, without which the judgment can not be enforced, the writ may, in terms, command the signing of the judgment, the act of affixing the signature being regarded as purely a ministerial duty.[4]

§ 535. Upon principles analogous to those just considered, the form of the writ may be determined in cases where it is applied to set in motion municipal officers, and to compel the auditing of claims and demands against municipal corporations. And where the writ issues to compel municipal authorities or boards to audit and pass upon demands against the municipality, it should be limited in form and terms to merely setting the officers in motion and requiring them to act, without directing them to render any particular decision,

[1] People v. Lee, 14 Cal. 510.

[2] State v. Howard Co. Court, 41 Mo. 247.

[3] Cortleyou v. Ten Eyck, 2 Zab. 45. See also Lloyd v. Brinck, 35 Tex. 1.

[4] Life & Fire Insurance Co. v. Wilson's Heirs, 8 Pet. 291.

or to audit the demands at any given amount.[1] When, therefore, it is sought to require such officers to audit a particular demand, and to draw their warrant for its payment, instead of directing them to audit the demand at a given sum, the direction should be to audit the claim and to issue their warrant for such sum as they may allow.[2]

§ 536. As regards the contents of the alternative writ, the general rule is that it should contain all matters necessary to entitle the relator to the relief claimed. In other words, it should allege all the facts which go to constitute the duty, and which induce the obligation on the part of respondent, to perform the act required.[3] And the gravamen of * 379 the complaint, as stated in the inducement of the writ, must be distinctly charged, since the courts will infer no fault or dereliction on the part of the respondent for the purpose of sustaining the writ.[4] But a mere recital in the writ of a statute, out of which it is claimed the duty arises whose enforcement is sought, will not be deemed a fatal objection when enough is recited to sustain the relator's case.[5] And upon mandamus to compel the making of certain alterations in public works, by persons who are entrusted by law with discretionary powers as to the extent of the alterations required, as well as their mode of performance, it is sufficient if the alternative writ commands the doing of the acts in general terms, without specifying any particular alterations.[6]

§ 537. The alternative writ being regarded as the foundation of all the subsequent proceedings in the case, and

[1] See People v. Supervisors of San Francisco, 11 Cal. 42; Furman v. Knapp, 19 Johns. Rep. 248; Bright v. Supervisors of Chenango, 18 Johns. Rep. 242; People v. Supervisors of N. Y. 32 N. Y. 473; People v. Supervisors of Delaware Co. 45 N. Y. 196; People v. Supervisors of Macomb Co. 8 Mich. 475.

[2] Tuolumne Co. v. Stanislaus Co. 6 Cal. 440.

[3] Peat's case, 6 Mod. Rep. 310. King v. Bishop of Oxford, 7 East, 345.

[4] See opinion of DENMAN, C. J., in Queen v. Eastern Counties R. Co. 10 Ad. & E. 531.

[5] Opinion of HOLT, C. J., in King v. Slatford, 5 Mod. Rep. 316.

[6] King v. Bristol Dock Company, 6 B. & C. 181.

resembling in this respect a declaration in an ordinary action at common law, it must show upon its face a clear right to the relief demanded, and the material facts on which the relator relies must be distinctly set forth, so that they may be admitted or traversed by the return.[1] A mere general assertion that injustice has been done the relator, does not suffice to meet the requirements of the rule, but he should state the exact particulars in which he claims to have been wronged, in order that the respondent may be enabled to answer them specifically.[2] And the matter of inducement stated in the alternative writ should include everything necessary to show jurisdiction over the subject of the writ, and to warrant its mandate, and these facts should be stated with precision and issuably.[3]

§ 538. It is to be presumed that all the material facts upon which the relator founds his claim to relief * 380 are stated in the alternative writ, since it is from this source only that the respondent can learn what the requirements of the court are, and what he is commanded to do. Great strictness is, therefore, requisite in the form and contents of the alternative writ, which must neither be enlarged beyond nor restricted within the limits of the order of the court. Any substantial variance, changing the character of the act required to be done, will be fatal and may be taken advantage of on motion to quash.[4] And an alternative mandamus which does not allege the facts upon which the relator relies, and which fails to apprise the respondent of the grounds on which relief is sought, is fatally defective, and the defect being in substance, it is held that it may be taken advantage of at any stage of the proceedings.[5] The writ should also call the attention of the respondent with especial * 381

[1] Canal Trustees *v.* The People, 12 Ill. 254; People *v.* Supervisors of Westchester, 15 Barb. 607; McKenzie *v.* Ruth, 22 Ohio St. 371; State *v.* School District No. 9, 8 Neb. 92.

[2] People *v.* Supervisors of Westchester, 15 Barb. 607.

[3] Chance *v.* Temple, 1 Iowa, 179.

[4] Hawkins *v.* More, 8 Ark. 345.

[5] Canal Trustees *v.* The People, 12 Ill. 254.

certainty and particularity to the precise thing which he is required to do.[1]

§ 539. Especial care should be taken in framing the mandatory clause of the alternative mandamus, since the writ must be enforced in the terms in which it is issued, * 382 or not at all, and the relator is concluded by its terms.[2] The mandatory clause should, therefore, be supported by and should not exceed the averments of title or right which form the inducement of the writ, and should be in conformity with the legal obligation of the respondent. If it exceeds the limits of such legal obligation, it is void.[3] And an additional reason for the strictness exacted in the statement in the mandatory clause, of the duty required of the respondent, is found in the fact that, if the alternative writ is awarded for a purpose partly proper and partly improper, the court will not enforce it by a peremptory mandamus as to that which is proper, but will quash the whole.[4] When, therefore, the alternative writ demands more than the relator is entitled to, judgment will be given for the respondent, and the court will not separate and give judgment for the relator as to a part of the requirement of the writ, and for the respondent as to the residue.[5] And when the mandatory clause, as prayed for by the relator, is so framed as to compel respondent to look *dehors* the writ, in order to ascertain the exact duty required of him, it is so defective that a peremptory mandamus will not be awarded.[6] The mandatory clause, therefore, like the body of the writ, should expressly and clearly state the precise thing which is required of the respondent.[7] So when the alternative writ

[1] People *v.* Brooks, 57 Ill. 142.

[2] Chance *v.* Temple, 1 Iowa, 179; Hartshorn *v.* Assessors of Ellsworth, 60 Me. 276. And see State *v.* City of Milwaukee, 22 Wis. 397.

[3] Chance *v.* Temple, 1 Iowa, 179.

[4] Hartshorn *v.* Assessors of Ellsworth, 60 Me. 276.

[5] People *v.* Supervisors of Dutchess, 1 Hill, 50.

[6] Hartshorn *v.* Assessors of Ellsworth, 60 Me. 276.

[7] People *v.* Brooks, 57 Ill. 142; State *v.* Trustees of Town of Pacific, 61 Mo. 155.

requires the respondent, a municipal corporation, to do several acts in the alternative, as to pay a certain judgment, or to issue bonds for its payment, or to levy a tax upon its taxable property for its payment, the acts being distinct in their nature and the writ designating neither one in particular, a motion to quash will be sustained.[1]

§ 540. It has been shown in the opening chapter to be a fundamental principle of the law of mandamus, that the relief will never be granted where any other ade- * 383 quate, legal remedy exists, by which the party aggrieved may obtain full redress.[2] And the doctrine was formerly maintained, in the court of kings bench, that the alternative writ should allege, in terms, the want of any adequate legal remedy, as a foundation for the exercise of the extraordinary jurisdiction of the court by mandamus.[3] In this country, however, the doctrine would seem to be well established, that it is not necessary to allege in the alternative writ that the relator has no other remedy, or that he is without redress by the ordinary legal methods, it being sufficient in this respect that the facts stated in the writ show this to be the case. In other words, the existence or non-existence of other adequate remedy is a conclusion of law, to be drawn by the court from the facts stated, and it need not, therefore, be distinctly alleged in the alternative writ.[4] And it is held that the facts showing the absence of other adequate remedy need not be stated affirmatively, but that it is sufficient to state them by way of recital.[5]

§ 541. Under the English practice, the alternative writ only issued from the court of kings bench, after a rule to show cause had been made absolute, against the person or body to whom the proceedings were directed, and this practice has been adopted by some of the states of this country.

[1] State v. City of Milwaukee, 22 Wis. 397.

[2] See § 15, *ante*.

[3] King v. Overseers of Shepton Mallett, 5 Mod. Rep. 421.

[4] State v. Jones, 1 Ired. 129; State v. Goll, 3 Vroom, 285.

[5] State v. Goll, 3 Vroom, 285.

In all cases where this practice prevails, the English rule should be followed, requiring the alternative writ to be framed in strict accordance with the rule as made absolute. And a failure to conform to the terms of the rule in this respect, is sufficient ground for sustaining a motion to supersede the alternative mandamus.[1] As illustrating this principle, where the rule, as granted against the mayor and aldermen of a municipal corporation, was, that they should assemble and keep courts and do the office of the corporation, but the alternative writ, as issued, required them also * 384 to admit all those to their freedom who had a right to be free of the corporation, the writ was superseded before return, the court holding that there was no warrant on which to ground it.[2] And it would seem that, after return made, such a discrepancy between the alternative mandamus and the rule, constitutes sufficient ground for quashing the writ.[3]

§ 542. The proper direction of the alternative mandamus is a matter of considerable importance, since it is by the direction only that it is to be determined who shall obey the writ, or make return thereto. The general rule is, that it should be directed to those, and to those only, who are to obey it, and a disregard of this rule is sufficient ground for sustaining a motion to quash.[4] And where there are two persons, specially designated by law, either of whom may do the thing required, it would seem that the proceedings should be instituted against both, and that the alternative writ should command them, or one of them, to perform the desired act.[5] And where the writ runs to an officer, for the performance of a duty incumbent upon him by virtue of his

[1] Rex v. Wildman, Stra. 879; King v. Mayor of Kingston-upon-Hull, 11 Mod. Rep. 382; S. C. 8 Mod. Rep. 209.

[2] King v. Mayor of Kingston-upon-Hull, 11 Mod. Rep. 382.

[3] See King v. Mayor of Kingston-upon-Hull, 8 Mod. Rep. 209.

[4] Regina v. Mayor of Hereford, 2 Salk. 701; King v. Justices of Nottingham, 2 Barn. K. B. 56.

[5] Opinion of Lord ELLENBOROUGH, in King v. Bishop of London, 13 East, 419.

official station, it should be directed to him by his official description or title.[1]

§ 543. Upon mandamus to a municipal corporation, directing the performance of a duty incumbent upon the corporate authorities, while it is usual to direct the writ to the whole corporation, it is only necessary, in fact, that it should run to such of the corporate authorities as are concerned in the execution of the thing required. Where, therefore, it is not in the power of others to put in execution the mandate of the writ, their omission will not be considered a misdirection.[2] And it has been held by the court of kings bench, that a mandamus to compel the election of a town clerk was bad, when it ran to the mayor, aldermen, and common council of the municipality, instead * 385 of to the mayor and aldermen only, in whom the right of election was. And the court will not compel a return to a writ thus misdirected, but will supersede the writ, as having been improvidently issued in the first instance.[3] But where the alternative mandamus to elect and swear in a mayor of a municipality is directed to the mayor and burgesses, commanding them to elect and swear in according to their authority, the direction will be held good, notwithstanding the power of election is in the burgesses alone, and the power of swearing in in the mayor alone, since something is required by the writ of each of those to whom it is directed.[4] It seems to have been the earlier English practice to direct the writ to the municipality, as a body politic, and by its corporate name, and a misdirection was formerly held sufficient ground for sustaining a motion to quash, as where the writ ran to the mayor and aldermen, instead of to the corporation *eo nomine*.[5] In this country, however, the earlier

[1] King *v.* University of Cambridge, 1 W. Black. 547.

[2] Rex *v.* Mayor of Abingdon, 2 Salk. 700.

[3] Rex *v.* Mayor of Norwich, Stra. 55.

[4] King *v.* Mayor of Tregony, 8 Mod. Rep. 111.

[5] Regina *v.* Mayor of Hereford, 2 Salk. 701. See also King *v.* Taylor, 8 Salk. 231. But see King *v.* Mayor of Abingdon, Ld. Raym. 559.

English doctrine has not been followed, and it is regarded as correct practice to direct the writ to the mayor and aldermen of a city, as such, instead of to the body politic by its corporate name and title.[1]

§ 544. In cases of mandamus to subordinate courts, to set them in motion and to compel action upon matters properly within their jurisdiction, on which it is their duty to act, it would seem to be correct practice to direct the alternative writ, either to the court as such, or to the individual judges of whom it is composed.[2] But the direction should be to the particular judge or judges of the court, when there are other judges authorized by law to hold the terms of the court, that it may be known against whom the authority to enforce obedience to the writ shall, if necessary, be exercised.[3]

§ 545. When the jurisdiction by mandamus is
* 386 invoked against private corporations, to procure an inspection of their records by a person properly entitled thereto, the alternative writ should be directed to the actual custodian of the books and records, although he is merely a ministerial officer, acting under the direction and by the command of others. Thus, when the writ is sought in aid of an inspection of the books of a banking corporation, whose records and books are in the hands of the cashier, it should be directed to that officer, although he is subordinate to a board of directors. In such case, the general rule applies, requiring the writ to be directed to the particular person whom it is sought to coerce, and the cashier having charge of the books, his refusal to submit them to inspection may be treated as his individual act, and the writ will, therefore, run to him in person. It is proper, however, in such case,

[1] See Mayor v. Lord, 9 Wal. 409.
[2] St. Louis County Court v. Sparks, 10 Mo. 118.
[3] Hollister v. Judges, 8 Ohio St. 201.

to direct the writ also to the board of directors, under whom the cashier acts.[1]

§ 546. The mandatory clause of the alternative writ usually concludes with an alternative sentence, requiring the person to whom it is directed, in default of obeying the mandate, to show cause to the contrary, and this alternative clause is one of the distinguishing features between the form of the alternative and of the peremptory writs of mandamus. It would seem, however, that the omission of the alternative clause, is not to be regarded as a fatal defect, and does not constitute sufficient ground for sustaining a motion to quash, the writ being mandatory and imperative in its terms, and it being the duty of the respondent, either to obey the mandate of the court, or to make return.[2] It is important to observe, however, that the sufficiency of the writ is to be determined solely from its own contents, and any defects which may be apparent therein can not be supplied from the return.[3]

[1] People v. Throop, 12 Wend. 314.

[2] King v. Owen, 5 Mod. Rep. 188.

[3] Queen v. Hopkins, 1 Ad. & E. N. S. 161.

CHAPTER X.

OF THE PEREMPTORY WRIT.

§ 547. General nature of the peremptory writ.
547 *a*. Not ordinarily granted in first instance.
548. Must conform to the alternative writ.
549. No return allowed.
550. Legal duty of respondent must appear; writ not granted upon incomplete record.
551. Failure to make return; insufficiency of return; act already performed.
552. Not issued on *ex parte* application; when granted without alternative writ.
553. Rule to show cause may take place of alternative writ.
554. Return to alternative writ, when taken as true.
555. Peremptory mandamus to judge to sign bill of exceptions.
556. Writ of error would not lie at common law; remedied by statute of Victoria.
557. Writ of error generally allowed in this country.
558. Peremptory writ vacated on ground of fraud.
559. Not granted *non obstante veredicto*.
560. Rule where several defenses are joined in return.
561. Certainty required in peremptory writ.
562. Right of amendment doubtful.
563. Writ refused notwithstanding verdict.
564. Form and contents determined by rules governing the alternative writ.

§ 547. The peremptory writ of mandamus is the
* 387 final or absolute mandate of the court, directing the performance of some official act or duty on the part of the respondent, upon his failure to make satisfactory return to the alternative writ previously granted. It is the final judgment in the proceeding, and sustains much the same relation to the alternative writ that a perpetual injunction bears to a preliminary or interlocutory injunction, being the

final assertion of the relator's right and of the respondent's duty. At common law, the peremptory mandamus was granted only in the event of the return to the * 388 alternative writ being held insufficient upon its face. And if the respondent returned a sufficient cause to the alternative writ, even though false in fact, the court proceeded no further with the mandamus, but left the party injured to his collateral remedy, by an action on the case for a false return.[1] If, in such action, the return was falsified and the action sustained, the peremptory mandamus could not be refused.[2] But by the statute of Anne,[3] the prosecutor or relator was allowed in certain cases, and by a subsequent statute[4] in all cases, to plead to or traverse all or any of the material facts contained in the return, to which respondent might reply, take issue, or demur, whereupon such further proceedings were allowed as might have been had upon an action for a false return, and if the relator succeeded upon the issues joined, he was entitled to a peremptory mandamus forthwith.

§ 547 *a*. A peremptory mandamus being an extraordinary remedy to enforce the performance of a pre-existing duty, or to secure a specific legal right, it will only be granted when the right or duty is clearly established.[5] If upon the case as presented a fair, legal controversy is shown, which should not be disposed of summarily, but only after full hearing, the court will not grant the peremptory writ in the first instance, but only the alternative writ.[6] And when the return sets up a defense to the proceeding, it is error to award a peremptory mandamus until the issues presented by the pleadings are disposed of.[7] But when both parties are heard upon the application for the writ, or upon the rule to show cause,

[1] See 3 Black. Com. 111.

[2] Buckley *v.* Palmer, 2 Salk. 430.

[3] 9 Anne, ch. 20, sec. 2, see Appendix, A.

[4] 1 William IV. ch. 21.

[5] State *v.* Mayor of Manitowoc, 52 Wis. 423; People *v.* Supervisors of Greene Co. 64 N. Y. 600.

[6] People *v.* Supervisors of Greene Co. 64 N. Y. 600.

[7] Gregg *v.* Pemberton, 53 Cal. 251.

and there is no dispute concerning the facts and the relator is legally entitled to the relief sought, a peremptory writ may issue in the first instance.[1]

§ 548. In its form and general features, the peremptory mandamus differs from the alternative writ only in the omission of the alternative clause, substituting therefor a peremptory and absolute command, against which no cause can be shown. And it is a well-settled principle that the peremptory writ must conform strictly to the alternative mandamus, being necessarily limited as to form by the terms of the alternative writ. In other words, the courts are powerless to award the peremptory writ of mandamus in any other form than that fixed by the alternative writ.[2] It follows, therefore, that if the alternative writ commands the doing of several things, it is incumbent upon the relator, in order to entitle himself to the peremptory writ, to show that he is entitled to the performance of all the things specified, and if he fails in any substantial part in establishing his title to any of the things sought, there can be no peremptory mandamus.[3] If, however, the peremptory writ differs from the alternative only in immaterial details as to the mode of performing the duty required, the substance of both being the same, and both requiring the performance of the same act, the variance will not be fatal.[4] And the proper order of the

[1] State *v.* Mayor of Paterson, 35 N. J. L. 196; State *v.* Freeholders, 35 N. J. L. 269; State *v.* Board of Finance, 38 N. J. L. 259. In New York, it is held under a statute providing that in case a verdict shall be found for the person suing out the alternative writ he shall be entitled to the peremptory writ without delay, that the relator is not entitled to the peremptory writ when the record shows no legal right, there being a mistake in the return in matters of fact, resulting in a verdict for the relator. People *v.* Batchellor, 53 N. Y. 128.

[2] Queen *v.* East & West India Docks etc. R. Co. 2 El. & Bl. 466; State *v.* Cheraw & C. R. Co. 16 S. C. 524; Chance *v.* Temple, 1 Iowa, 179; Price *v.* Harned, Ib. 473; State *v.* County Judge of Johnson Co. 12 Iowa, 287. See, *contra*, Osage Valley R. Co. *v.* County Court, 53 Mo. 156; School District No. 1 *v.* Board of Education, 73 Mo. 627.

[3] Queen *v.* East & West India Docks etc. R. Co. 2 El. & Bl. 466.

[4] People *v.* Dutchess & C. R. Co. 58 N. Y. 152.

court upon the hearing of the application for the peremptory writ after the alternative writ has been granted, is, "let the writ be peremptory," or "peremptory writ * 389 refused."[1]

§ 549. From the nature and form of the peremptory mandamus, as above shown, it necessarily follows that there can be, strictly speaking, no such thing as a return to this writ, since it admits of no excuse, palliation, or denial, but absolutely requires the performance of the particular thing ought, and only a certificate of obedience to the writ and of what has been done in its execution is allowed.[2] And if the person to whom the writ is directed fails in this perfect and implicit obedience, he is liable to proceedings in attachment for a contempt of court.[3] It would seem, however, to be competent, upon proceedings in attachment, to urge any objections to the validity of the peremptory writ, and if sufficient objections are shown, obedience will not be enforced by attachment.[4]

§ 550. Before the peremptory writ will issue, the relator is bound to satisfy the court that there is a clear, legal duty incumbent upon the respondent, to comply with all the requirements contained in the alternative writ.[5] But where the facts upon which the alternative mandamus is based have all been passed upon by the court, and they are not denied or questioned by the return, the return will be deemed insufficient, and the peremptory writ will be ordered forthwith.[6] It is to be observed, however, that a peremptory mandamus is never granted upon an incomplete record, and where the

[1] Chance v. Temple, 1 Iowa, 179.

[2] 3 Black. Com. 111; State v. Smith, 9 Iowa, 334; Queen v. Ledgard, 1 Ad. & E. N. S. 616; People v. Barnett, 91 Ill. 422; State v. McLin, 16 Fla. 17; State v. Board of Canvassers, 17 Fla. 9.

[3] 3 Black. Com. 111; State v. Board of Canvassers, 17 Fla. 9. And see, generally, as to violations of the peremptory writ and their punishment, Chap. XI, *post*.

[4] Queen v. Ledgard, 1 Ad. & E. N. S. 616.

[5] Queen v. Caledonian R. Co. 16 Ad. & E. N. S. 19.

[6] People v. Seymour, 6 Cow. 579.

proceedings upon the alternative writ remain incomplete, it will be withheld until the whole record is brought before the court.[1] Nor will the peremptory writ be awarded when it would be fruitless if granted.[2]

§ 551. The fact that the respondent fails to make return to the alternative writ, does not necessarily entitle the * 390 relator to a peremptory mandamus without taking steps to enforce a return, and in some of the states it is held to be the better practice, in such case, to take the necessary steps to enforce a return before issuing the peremptory writ.[3] Nor is the issuing of the peremptory writ a necessary consequence of the respondent's return being insufficient, when such insufficiency is in the pleadings only, and not in the matter alleged. In such case it is held to be the better practice not to order the peremptory mandamus in the first instance, but to direct the filing of a fuller and more complete return.[4] And if it be shown that the act which it is sought to coerce has already been performed, the peremptory writ will not go, since if granted it would necessarily prove fruitless.[5]

§ 552. The person against whom the peremptory writ is sought should always have an opportunity of being heard before such final relief is granted against him, and it is error to issue a peremptory mandamus upon an *ex parte* application.[6] And it is rarely issued without first granting the alternative writ, or a rule to show cause. Even under a statute expressly authorizing the issuing of a peremptory mandamus in the first instance, in cases where the right is

[1] Queen *v.* Baldwin, 8 Ad. & E. 947.

[2] State *v.* Inspectors of Election, 17 Fla. 26.

[3] State *v.* Baird, 11 Wis. 260. But in People *v.* Judges of Ulster, 1 Johns. Rep. 64, it is said to be unnecessary to go through with the process and delay of rules and attachments in order to compel a return, the alternative clause of the writ being regarded as for the benefit and convenience of the respondents.

[4] State *v.* Jones, 10 Iowa, 65.

[5] State *v.* Schofield, 41 Mo. 38.

[6] Swan *v.* Gray, 44 Miss. 393; Armigo *v.* Territory, 1 New Mexico, 580.

clear and it is apparent that no valid excuse can be given for not performing the duty required, it is to be issued with great caution, and only upon a state of unquestionable facts, such as leave no room for doubt in the mind of the court.[1] But where the law fixing the duty in question is perfectly plain and free from doubt, and due notice has been given to all parties in interest, it has been held proper to grant the peremptory writ without having first issued an alternative mandamus.[2] And where a plain and imperative duty is incumbent by law upon public officers, and the facts are not disputed, the court will not require the parties * 391 to go through with the form of an alternative mandamus, when they have been notified and have been heard by counsel, and the court is fully satisfied as to the legal duty.[3] So where a recorder of deeds has refused to record a deed properly acknowledged and entitled to record, which has been duly presented for that purpose, a peremptory writ has been allowed in the first instance.[4]

§ 553. A rule to show cause may properly take the place of the alternative writ, for the purpose of laying the foundation for granting a peremptory mandamus. And when the case has been fully heard upon the rule to show cause, and the facts are sufficiently established, or the cause shown against issuing the writ is insufficient, there can be no impropriety in allowing the peremptory writ in the first instance, especially when a delay might render the interposition of the court of no benefit to the party aggrieved, and when the granting of the peremptory mandamus, without first having awarded the alternative writ, can not preju- * 392 dice the parties in interest.[5]

§ 554. In several of the states the common-law doctrine

[1] Home Insurance Co. *v.* Scheffer, 12 Minn. 382.

[2] People *v.* Pearson, 1 Scam. 458.

[3] Commissioners of Knox Co. *v.* Aspinwall, 24 How. 376; *Ex parte* Rogers, 7 Cow. 526.

[4] *Ex parte* Goodell, 14 Johns. Rep. 325.

[5] People *v.* Throop, 12 Wend. 183; People *v.* Brennan, 39 Barb. 522; People *v.* Assessors of Barton, 44 Barb. 148.

prevails, that upon an application for a peremptory mandamus, the facts embraced in the return to the alternative writ are to be taken as true, until proven false in an action for a false return.[1] The doctrine, however, is understood as applying only to such facts as are relevant to the subject of inquiry before the court, and irrelevant facts will not be considered in the investigation.[2] In the states still adhering to this common-law doctrine, the courts usually pass upon the case as presented by the alternative writ and the return, and investigate no questions of fact other than as thus presented. If the return presents sufficient ground for withholding the peremptory writ, it is refused, otherwise it is granted.[3] And where a traverse is allowed, but the relator fails to traverse any of the allegations of the return, they are to be taken as true for the purposes of the application for a per-
* 393 emptory mandamus, the relator being only entitled to the peremptory writ upon the ground that he has shown the return to be false, as if at common law he had established its falsity in an action on the case for a false return.[4] So, where, in disposing of the application upon the answer to the rule to show cause, the court regards the answer as a return to an alternative mandamus, the effect of moving for the peremptory writ upon the pleadings, is to admit the truth of the matters contained in the answer.[5]

§ 555. The duty of the respondent to whom the alternative writ is directed, being to obey its mandate or show satisfactory cause to the contrary, the court will not permit him to question its power in place of rendering obedience to the writ. And where the alternative writ has issued, command-

[1] Board of Police v. Grant, 17 Miss. 77; Beaman v. Board of Police, 42 Miss 237; Swan v. Gray, 44 Miss. 393; Carroll v. Board o Police, 28 Miss. 38; Commonwealth v. Commissioners of Lancaster, 6 Binn. 5.

[2] Carroll v. Board of Police, 28 Miss. 38.

[3] Commonwealth v. Commissioners of Lancaster, 6 Binn. 5.

[4] Tucker v. Justices of Iredell, 1 Jones, 451.

[5] Board of Police v. Grant, 17 Miss. 77; Beaman v. Board of Police, 42 Miss. 237.

ing the judge of an inferior court to sign and seal a bill of exceptions, but he refuses to make return thereto, and presents, in lieu of a return, an argument against the power of the court to take cognizance of the case, the peremptory mandamus will go.[1]

§ 556. At common law, a writ of error would only lie upon a final judgment, or upon an award in the nature thereof, and the granting or refusing of a peremptory mandamus was not, prior to the statute of Anne, nor indeed under that statute, if disposed of in a summary manner, without plea or demurrer, deemed a final judgment within the meaning of the rule, and hence error would not lie.[2] Neither the statute of Anne, nor the subsequent statute of William IV., extending its provisions,[3] gave the relator the right * 394 of demurring to the return, in order that a decision as to its validity could be reviewed on error, but this omission was finally cured in England by the passage of an act allowing a demurrer to the return and judgment thereon, upon which error may be brought, and permitting any party to the record in cases of mandamus who shall think himself aggrieved by the judgment of the court to prosecute a writ of error, in like manner as in personal actions generally.[4]

§ 557. In this country, the courts, almost without exception, regard the judgment of an inferior court awarding or refusing a peremptory mandamus, after issue joined, as a final judgment, which may be reviewed upon error or appeal. But since the statute of Anne did not abrogate the summary common-law procedure, upon the return alone without further pleadings, and since the relator is still at liberty to adopt the old method, and to insist upon a summary hearing

[1] People v. Pearson, 2 Scam. 189.

[2] Rex v. Dean & Chapter of Dublin, Stra. 536; S. C. 8 Mod. 27, affirmed in House of Lords, 1 Bro. P. C. 72; Pender v. Herle, 3 Bro. P. C. 505; New Haven & N. Co. v. The State, 44 Conn. 376.

[3] 1 Wm. IV. ch. 21.

[4] 6 & 7 Vict. ch. 67, see Appendix, B. And see Queen v. Churchwardens, 1 App. Ca. 611.

without pleadings, it is held, where this course is adopted, that a writ of error will not lie, there being no record on which to base the writ.[1] In Mississippi, it is held that the refusal of a peremptory mandamus is not a matter of discretion, and may be reviewed on writ of error.[2] In New York, when an appeal is properly taken from a judgment awarding a peremptory mandamus, and the bond or undertaking required by statute is given, the appeal operates as a supersedeas upon the judgment,[3] and the same doctrine prevails in Missouri,[4] and in Texas.[5] But in South Carolina, it is held that while an appeal will properly lie from an * 395 order allowing a peremptory mandamus, the appeal does not have the effect of a *supersedeas*, and the mandamus must still be executed.[6] In New Jersey, however, a rigid adherence to the common-law rule is preserved, and a writ of error to review the decision of an inferior court on the award of a peremptory mandamus, is refused on three grounds: first, because in that state the proceeding by mandamus is not regarded in the nature of a civil suit for the determination of a private right, but as the exercise of prerogative power; secondly, because the order awarding the writ is not in the nature of a final judgment, upon a question of right between the parties; and thirdly, because the common-law rule denying the writ of error has never been changed in New Jersey, either by usage or statute.[7] In Nebraska, proceedings in mandamus can be reviewed only upon writ of error, and not by appeal.[8]

§ 558. While, as we have already seen, no return is

[1] People *v.* President and Trustees of Brooklyn, 13 Wend. 130. And see People *v.* Throop, 12 Wend. 183.

[2] Hardee *v.* Gibbs, 50 Miss. 802.

[3] People *v.* Commissioners of Highways, 25 How. Pr. 257. See, *contra*, People *v.* Steele, 1 Edmonds Select Cases, 505, 568.

[4] State *v.* Lewis, 76 Mo. 370, overruling State *v.* Horner, 10 Mo. App. 307.

[5] Griffin *v.* Wakelee, 42 Tex. 513.

[6] Pinckney *v.* Henegan, 2 Strob. 250.

[7] Layton *v.* The State, 4 Dutch. 575.

[8] State *v.* Lancaster Co. 13 Neb. 223.

allowed to a peremptory mandamus, the courts exacting implicit and unquestioned obedience to the writ, yet it is competent for the court granting the peremptory writ to vacate or set it aside, when it was obtained through fraud or false representations on the part of the relator. Thus, where it had been agreed between the parties that no further proceedings in an action for mandamus should be had at that term of court, and the relator then employed other counsel and obtained a mandamus, in disregard of the agreement, a motion to vacate the peremptory writ was sustained.[1]

§ 559. After the relator has pleaded to the return, taking issue upon all its allegations, and a verdict is found against him, it is error to grant a peremptory mandamus, since a judgment *non obstante veredicto* is not recog- * 396 nized in mandamus proceedings. When the relator has traversed the truth of the return, the granting of the peremptory writ is dependent upon a verdict in his favor, as was the case at common law in an action for a false return. And failing to obtain a verdict, he is not entitled to a peremptory mandamus.[2]

§ 560. Since it is competent for the respondent to present, in his return to the alternative writ, several different defenses, provided they are not inconsistent with or repugnant to each other, if he prevails on either of the grounds relied upon, the peremptory writ will be refused.[3] These several defenses, however, should be consistent with each other, and if inconsistent or repugnant the return may be quashed *in toto*, and the peremptory writ awarded.[4]

§ 561. Great particularity is necessary in stating in the peremptory writ the precise thing which is required, in order that the respondent may be definitely apprised of all that he is commanded to do. And where a peremptory manda-

[1] People *v.* Everitt, Coleman & Caine, 149; S. C. 1 Caine's Rep. 8.

[2] People *v.* Board of Metropolitan Police, 26 N. Y. 316.

[3] *Ex parte* Selma & Gulf R. Co. 46 Ala. 230.

[4] King *v.* Mayor of York, 5 T. R. 66.

mus has been awarded to compel the treasurer of a school district to pay certain orders against the district, but the writ contains no description of the orders, either by number or amount, and this does not appear in any of the pleadings or other proceedings, the defect is fatal and will warrant the reversal of the judgment.[1] But where the writ is directed to public officers, commanding the performance of a public duty required of them by law, a reasonable degree of certainty in describing the thing to be performed is deemed sufficient, especially when the facts are within the personal knowledge of the officers to whom the writ is directed.[2]

§ 562. The authorities are not altogether reconcilable as to whether a peremptory mandamus may be amended, but the better doctrine seems to be, that no amendment should be allowed. In any event, a motion to amend and enlarge the peremptory writ, which fails to point out specifi- * 397 cally the particulars in which it is alleged to be defective, will be disregarded.[3] And when the peremptory mandamus demands more than the relator is entitled to by his alternative writ, the better practice is, instead of allowing an amendment to the peremptory writ, to set aside the order granting it, and to allow the relator to amend the alternative writ, that he may then be entitled to a peremptory mandamus.[4]

§ 563. If the petition on which the mandamus is asked is insufficient, and fails to make out a *prima facie* case, the court will refuse the peremptory writ, notwithstanding the verdict of a jury finding the facts as alleged in the petition. And the action of the court in denying the peremptory mandamus in such a case, is analogous to that in arresting judgment in an ordinary action at law.[5]

[1] State *v.* District Township of Dubuque, 11 Iowa, 155.

[2] People *v.* Nostrand, 46 N.Y. 375.

[3] State *v.* County Judge of Johnson, 12 Iowa, 237.

[4] Commissioners of Columbia *v.* King, 13 Fla. 451.

[5] People *v.* Commissioners of Highways, 52 Ill. 498.

§ 564. With regard to the form of the peremptory writ and its contents, it is to be tested by the same general principles applicable in construing the sufficiency of the alternative mandamus, the principal difference in form being the omission of the alternative clause in the peremptory writ. For these principles of construction, and the tests to be applied in determining the sufficiency of the writ, the reader is referred to the preceding chapter.[1]

[1] See Chapter IX, *ante*.

disobedience, but he may still be compelled to do the act required by the writ.[1]

§ 567. Obedience to the writ is required during the entire time that it remains in force and unreversed by a higher tribunal, and the fact that the proceedings are subsequently reversed by an appellate court, affords no justification for a violation of the mandamus committed before such reversal.[2] Nor does the pendency of a writ of error to a judgment awarding a peremptory mandamus justify a violation of the mandamus, when such writ of error is not a *supersedeas*.[3] Nor does it afford a sufficient excuse for failure to obey the writ, that since it was granted the respondent has been enjoined in another court from performing the act required, since a peremptory mandamus, when once issued, can not, like an ordinary execution upon a judgment at law, be staid by injunction, and to allow such interference would necessarily lead to a conflict of jurisdiction and interrupt the whole course of judicial proceedings.[4]

§ 568. Mere irregularities in practice upon the
* 401 granting of the peremptory writ, or even the fact that it was improvidently granted, will not avail as a justification of one who has violated its mandate. And it is therefore no sufficient objection to proceedings in attachment, that the court issued the peremptory mandamus before an alternative writ had been allowed. The peremptory writ having actually been allowed, and being a writ whose allowance is within the discretion of the court, its regularity can not be questioned by respondents after they have had an opportunity of being heard on the rule to show cause.[5] So upon proceedings in attachment for disregarding a peremptory mandamus, the court will not consider in mitigation of

[1] State v. Smith, 9 Iowa, 334.

[2] Kaye v. Kean, 18 B. Mon. 339.

[3] Tyler v. Hamersley, 44 Conn. 393.

[4] Weber v. Zimmerman, 23 Md. 45. See also Commonwealth v. Sheehan, 81½ Pa. St. 132.

[5] State v. Elkinton, 1 Vroom, 335.

the alleged contempt questions going to defeat the right to the mandamus, which might have been urged against the relief in the first instance. Nor will the violation be justified on the ground of defective service, when the respondent has appeared and made return to the writ.[1] And upon appeal from an order finding appellant guilty of a contempt of court in violating a peremptory mandamus, no appeal having been taken from the order awarding the mandamus, the propriety of that order will not be considered by the court.[2]

§ 569. Where an inferior court has been directed by mandamus to restore certain cases which had been improperly dismissed, and to proceed to judgment therein, and the judge of such court withholds judgment until the following term, while considering a motion for a new trial, he is not guilty of any such contempt as to warrant proceedings in attachment.[3] And where judges of an inferior court have rendered themselves liable to attachment for contempt in disregarding a mandamus, but it is apparent by their return that no intentional contempt was committed, instead of an attachment, an *alias* mandamus will issue.[4] If a judge has already resigned his office, while it is true that he can not be required by mandamus to perform any judicial act connected therewith, yet if he had refused while still in office to do the act required by the mandamus, as to sign a bill of exceptions, he may be punished by fine as for a high contempt of court, since the superior tribunal, having properly acquired jurisdiction over the respondent in the first instance, to compel him to perform the required act, can not be divested of its power to punish for contempt by his resigning the office.[5] And while it is conceded that one important object to be attained * 402 in punishing for the contempt, is to compel the party to perform the required act, it by no means follows, because

[1] People *v.* Barnett, 91 Ill. 422.

[2] People *v.* Rochester & S. L. R. Co. 76 N. Y. 294.

[3] *Ex parte* Bradstreet, 8 Pet. 588.

[4] *Ex parte* Woodruff, 4 Ark. 630.

[5] People *v.* Pearson, 3 Scam. 270.

this can not be attained, that no punishment should be inflicted.[1] But when it is sought to punish by attachment judges of an inferior court, who have refused to obey a mandamus directing them to sign a bill of exceptions, it should clearly appear by the affidavit on which the motion for attachment is based, that the persons who were served with the writ were the persons who should have sealed the bill, and if this does not appear nothing can be taken by the motion.[2]

§ 570. While it is generally requisite that personal notice of the issuing of the writ should be shown, in order to lay the foundation for proceedings in attachment against a corporation for its violation, yet if a statute has dispensed with personal notice, by requiring notice in writing to be * 403 posted in some public place, such notice in accordance with the statute is sufficient, *prima facie*, to hold the members of the corporation. The rule to show cause why they should not be atttached for contempt will therefore issue in such case, leaving respondents to show by way of excuse that they had not received actual notice of the writ, if such were the case.[3]

§ 571. Where the writ has been granted to restore a minister of an incorporated church to his pastoral office, but he is subsequently disqualified from holding his place, by the regularly constituted authorities of the church, such disqualification has been held a sufficient cause for quashing the writ, and for discharging respondents from proceedings in attachment for its violation.[4] And it has been held competent, on proceedings in attachment, to urge any objections to the validity of the peremptory writ, and if sufficient objections appear, obedience will not be enforced.[5]

§ 572. Ordinarily an attachment for contempt issues only

[1] People *v.* Pearson, 3 Scam. 270.

[2] People *v.* Judges of Washington, 2 Caine's Rep. 97.

[3] King *v.* Edyvean, 3 T. R. 352.

[4] Weber *v.* Zimmerman, 23 Md. 45.

[5] Queen *v.* Ledgard, 1 Ad. & E. N. S. 616.

in case of violation of a peremptory mandamus, and the decisions to be found in the reports are chiefly with reference to such cases. It seems, however, to be the doctrine of the kings bench, that a failure to make return to the original, or to an *alias* mandamus, is such a contempt as to lay the foundation for proceedings in attachment,[1] but that an attachment will not be granted in such case without a peremptory rule to return the *alias* writ.[2]

§ 573. The jurisdiction by attachment, for contempt in violating or disobeying a mandamus, is extended to officers of municipal corporations, who have been guilty of such violation in their official capacity. And where municipal officers have disregarded a mandamus, directing them to assess and levy a tax, to provide for the payment of municipal bonds voted in aid of a subscription to a railway company, they may be punished by fine and imprisonment, as in other cases of contempt.[3] And in the case of mandamus to a * 404 municipal corporation, it would seem that personal service of the writ upon the corporate officers is not essential to warrant proceedings in attachment for its violation. Thus, where the writ was served upon a town clerk, but on no other officers of the corporation, an attachment was granted against the mayor and other corporate officers for failing to make return.[4]

§ 574. An attachment for contempt in violating or refusing to obey a peremptory mandamus, should be directed to all the persons guilty of disobedience to the mandate of the court. And where the peremptory writ has been granted against a board of canvassers of elections, composed of several distinct and independent officers, the mandate of the court extending to and covering them all, an attachment for violation

[1] See King *v.* Mayor of Fowey, 5 Dow. & Ry. 614; Mayor of Coventry's case, 2 Salk. 429.

[2] Mayor of Coventry's case, 2 Salk. 429.

[3] Commonwealth *v.* Taylor, 36 Pa. St. 263. See also, [illegible] *v.* Supervisors of Lee County, 2 [illegible] sell, 77.

[4] King *v.* Mayor [illegible] Dow. & Ry. 614; [illegible] & Ry. [illegible]

ing the writ should include them all.[1] It is not necessary, however, in proceedings by attachment for the violation of a mandamus, issued to a board of municipal officers composed of several different persons, to issue separate and distinct writs of attachment to each member of the board, the proper practice being to unite all the respondents in one attachment. And if in such case separate writs have issued to the individual members of the board, the proceedings will be consolidated and continued as a single attachment against the entire board.[2]

§ 575. Since the power of the federal courts is supreme, within the limits of their jurisdiction, and since, in cases of conflict between the federal and state tribunals, the latter must necessarily yield in matters resting within the jurisdiction of the former, it follows that it constitutes no sufficient justification for refusing to obey a mandamus regularly issued by a federal court in a matter properly presented for its adjudication, that the parties to whom the writ is directed have been enjoined in the state courts from performing the act commanded by the mandamus. Thus, where a circuit court
* 405 of the United States has issued its mandamus to a board of county supervisors, directing them to levy a tax in payment of certain judgments, recovered in the circuit court against the county, upon its bonds issued in aid of railways, the supervisors can not take refuge from a violation of the mandamus, under a previous injunction from the state courts, restraining them from levying the tax, and they will be attached for contempt, notwithstanding such injunction.[3]

§ 576. It seems to be the usual practice, both in
* 406 England and America, to require service of a rule to

[1] State v. Smith, 9 Iowa, 334.

[2] Durant v. Supervisors of Washington, Woolworth, 377.

[3] United States v. Supervisors of Lee County, 2 Bissell, 77, 1 Chicago Legal News, 121; Riggs v. Johnson Co. 6 Wal. 166. See also United States v. Silverman, 4 Dillon, 224.

show cause upon the respondents, before proceeding against them by attachment for a violation of the writ, and in ordinary cases this course should be pursued. Where, however, it is clearly apparent to the court, that the respondents have been guilty of a willful and deliberate violation of the mandamus, and that it is their settled purpose to continue in such violation, the rule to show cause may be dispensed with. In such case, although the parties may disclaim any intention to commit a willful con- * 407 tempt of court, yet it appearing by their return that they have deliberately violated the mandate of the court, and that they intend to continue the line of conduct adopted, in the future, a rule to show cause could serve no useful purpose, since the only cause which could be returned thereto has already been shown.[1]

§ 576 *a*. When the command of a writ of mandamus is in all respects within the jurisdiction of the court by which it is granted, proceedings in attachment for its violation are not reviewable by another court upon *habeas corpus* to procure the release of persons committed for such violation. If, however, the command is in whole or in part beyond the power of the court, the writ, or so much of it as exceeds the jurisdiction of the court, is void. And in such case *habeas corpus* will lie to procure the release of the persons so held in custody.[2]

[1] United States *v.* Supervisors of Lee County, 2 Bissell, 77, 1 Chicago Legal News, 121.

[2] *Ex parte* Rowland, 104 U. S. 604.

CHAPTER XII.

OF THE COURTS ENTRUSTED WITH THE JURISDICTION.

§ 577. The writ originally granted only by the kings bench.
578. Jurisdiction extended by statute to all superior courts in England.
579. No court in United States corresponding to the kings bench.
580. Courts usually fixed by constitution or statutes in this country.
581. The jurisdiction purely original; how exercised by appellate courts.
582. Appellate courts may grant writ in aid of their appellate jurisdiction.
582 *a*. Appellate courts may decline to exercise original jurisdiction.
583. Doctrine as between state and federal courts.
583 *a*. The same.
584. State courts will not grant writ to remove cause from state to federal court.
585. Nor will federal courts grant writ for such removal.
586. State courts may grant the writ in aid of decree or judgment of federal court.
587. Jurisdiction of United States Supreme Court by mandamus exercised only in aid of appellate powers.
588. Writ granted from Supreme Court of United States to inferior courts.
589. Circuit courts of United States devoid of original jurisdiction in mandamus.
590. But may grant the writ in aid of their existing jurisdiction.

§ 577. The use of the writ of mandamus as
* 408 a judicial process or remedy, had its origin in the court of kings bench in England, and the exercise of the jurisdiction was formerly confined exclusively to that court. From a simple missive or mandate of the sovereign, issuing directly to the subject, the writ was gradually moulded and shaped into a judicial process of an extensive remedial nature, which was freely granted by the kings bench, in the absence of other adequate

and specific remedy. It was regarded as the especial province of the court of kings bench to superintend all inferior tribunals throughout the kingdom, and to enforce at their hands the exercise of such judicial or ministerial powers as had been conferred upon them by parliament or by the crown, and for this purpose the writ under considera- * 409 tion was regarded as the most effective remedy.[1] Deriving its origin directly from the king, sitting in his own court, the writ was always regarded, in England, as a high prerogative remedy, in distinction from an ordinary writ of right. And the jurisdiction is spoken of as one of the "flowers of the kings bench,"[2] and was always jealously guarded by that tribunal. Being a court of very extended jurisdiction, entrusted with the superintendence of all civil corporations and inferior jurisdictions in the kingdom,[3] it was natural that this extraordinary remedy should be confined to this tribunal, and we accordingly find it shaped by the decisions of this court through several successive centuries, until it has attained its present symmetrical development, and is now recognized as the most effective of all the extraordinary remedies known to the common law.

§ 578. By the common-law procedure act of 1854, the jurisdiction by mandamus in England, was extended to all the superior courts in the kingdom, which were authorized to grant writs of mandamus, in connection with or as ancillary to any civil action brought in such courts, excepting actions of ejectment and replevin. The writ as thus issued was given the same force and effect as that of a mandamus from the court of kings bench, and the pleadings were assimilated, as nearly as possible, to those in ordinary actions for the recovery of damages. It was, however, expressly provided that the act should in no manner impair or take away the jurisdiction of the court of kings bench to grant writs of mandamus, and the jurisdiction of that court, therefore,

[1] See 3 Black. Com. 110.

[2] Per DODERIDGE, J., in Awdley v. Joy, Poph. 176.

[3] 3 Black. Com. 42.

remained substantially unchanged, although the practice and procedure in mandamus cases were greatly changed.[1] And by the supreme court of judicature act of 1873, the remedy was still further extended and the procedure simplified.[2]

§ 579. As regards the courts properly empowered to grant this extraordinary remedy, in this country, it is to be observed in the first place, that, under the American system, no court, either state or federal, possesses the same general functions and jurisdiction as the court of kings bench, nor does * 410 any judicial tribunal known to our system, represent the sovereignty of the country in precisely the same sense in which it is represented in England by the kings bench. And while this divergence between the judicial systems of the two nations, has in no manner impaired or altered the general remedial features of the writ of mandamus, which was transferred to this country as a part of the common law, it has yet had the effect of stripping the remedy of many of its purely prerogative features, and of reducing it more nearly to a level with ordinary civil actions for the protection of private rights.[3]

§ 580. The courts empowered to exercise the jurisdiction by mandamus, in this country, are generally fixed by the constitutions of the various states, or by legislative enactment not inconsistent therewith. Usually the power is conferred upon the various common-law courts of original and general jurisdiction, such as the circuit or district courts throughout the various states, and in many cases the pleadings and procedure to be adopted by these courts in dispensing the remedy are also regulated by statute. The writ is also granted, in many of the states, by the supreme judicial tribunal or court of last resort of the state, in some instances as a part of its original jurisdiction, created and defined by the organic law

[1] 17 & 18 Victoria, Chap. CXXV. Subdivision 3. See Appendix, C.

[2] 36 & 37 Victoria, Chap. 66, § 25.

[3] See § 5, *ante*.

of the state, and in other cases only in aid of its appellate powers.[1]

§ 581. But in whatever courts the power of granting this extraordinary remedy may be vested, it is uniformly regarded as an original and not an appellate jurisdiction. And the writ itself is in no sense an appellate process, but purely an original one, not employed in the revision of a cause already adjudged, but itself originating the cause.[2] It follows, therefore, that where the court of last resort of a state is limited, by the constitution of the state, to the exercise of an appellate jurisdiction only, it is powerless to grant the writ as an original proceeding, or to entertain jurisdiction in mandamus, except as a necessary incident or appendage * 411 of its appellate powers.[3] And in such case, the legislature of the state, being equally bound with the courts by the constitution of the state, as the fundamental and paramount law, can not confer upon the appellate court the power

[1] In Missouri, the Supreme Court of the state, although vested with original jurisdiction in mandamus, is averse to its exercise unless in cases of especial importance, preferring that the application should ordinarily be made in the first instance to the lower courts. See State v. County Court of Cooper Co. 64 Mo. 170. In Pennsylvania, under a statute authorizing the courts to issue writs of mandamus to all officers elected or appointed in and for their respective counties, no jurisdiction is conferred to grant the writ against an officer of the state. Commonwealth v. Wickersham, 90 Pa. St. 311. In Arkansas, it is held that mandamus will not lie from a circuit court to compel a sheriff to receive certain warrants in satisfaction of an execution from the Supreme Court of the state, since the court issuing the execution alone has power to control its process. Hinkle v. Ball, 34 Ark. 177. As to the circumstances under which the Supreme Court of Wisconsin will exercise its original jurisdiction in mandamus, see State v. Supervisors of Juneau Co. 38 Wis. 554.

[2] Daniel v. County Court of Warren, 1 Bibb, 496. See also King v. Hampton, 3 Hayw. (Tenn.) 59; State v. Biddle, 36 Ind. 138; Cowell v. Buckelew, 14 Cal. 640.

[3] Morgan v. The Register, Hardin (2nd edition), 618; Daniel v. County Court of Warren, 1 Bibb, 496; Howell v. Crutchfield, Hemp. 99; Westbrook v. Wicks, 36 Iowa, 382; Whitfield v. Greer, 3 Baxter, 78; State v. Hall, 6 Baxter, 3. See also United States v. Commissioners of Dubuque, Morris, 42.

of granting the writ as an original proceeding.[1] So
* 412 where the court of final resort of a state is vested only
with appellate powers, it can not grant a mandamus to a subordinate court, requiring it to proceed with a cause pending therein, since such a use of the writ is not a necessary adjunct to the discharge of the functions of the court as a purely appellate tribunal, and would be the exercise, not of an appellate, but of an original jurisdiction.[2] Nor will a court of appellate powers, which is restricted, by the organic law of the state, to the granting of such writs only as are necessary to the exercise of its appellate jurisdiction, issue a mandamus to the officers of a subordinate court, to compel any official action at their hands, but will leave the parties aggrieved to seek a remedy in the inferior court itself.[3] Nor will such court grant a mandamus to require the judge of an inferior court to direct the parties to a cause to give sufficient surety for its prosecution.[4]

§ 582. The doctrine as above stated, however, in no manner impairs the right of the courts of final resort to issue the writ, when necessary in aid of their appellate powers, and in such cases the proceeding by mandamus is not regarded as an original one, but as auxiliary to and in aid of the appellate jurisdiction, with which they are properly
vested.[5] For example, a court of purely appellate
* 413 powers may, in aid of its appellate jurisdiction and as
a necessary incident to its exercise, grant the writ to a subordinate court, requiring it to sign and seal a bill of exceptions in a cause pending in the appellate tribunal on appeal, in order that the record may be complete, the use of

[1] Morgan v. The Register, Hardin (2nd edition), 618.

[2] King v. Hampton, 3 Hayw. (Tenn.) 59; State v. Hall, 6 Baxter, 3; State v. Biddle, 36 Ind. 138. See also Cowell v. Buckelew, 14 Cal. 640.

[3] Cowell v. Buckelew, 14 Cal. 640.

[4] Whitfield v. Greer, 3 Baxter, 78.

[5] United States v. Commissioners of Dubuque, Morris, 42; State v. Hall, 3 Cold. 255. See also Ing v. Davey, 2 Lea, 276.

the writ in such a case being necessary to perfect the right of the appellant, and being a proper adjunct of the powers of the appellate court.[1] And it would seem that a court of appellate jurisdiction only may grant a mandamus to command an inferior court to accept a proper bond for the purpose of perfecting an appeal from such inferior court to the appellate tribunal.[2]

§ 582 *a*. Although the supreme court of a state may have original jurisdiction in mandamus, it may yet decline to exercise it and may remit the applicant to a subordinate court, when this course seems more conducive to the ends of justice. Thus, when application is made to a supreme court for a mandamus to require the clerk of an inferior court to issue a process, if such inferior court itself has jurisdiction in mandamus, the supreme court may decline to interfere and leave the relator to apply to the subordinate court.[3]

§ 583. Questions of grave importance have frequently arisen, and must necessarily occur under the American system, touching the relative powers and jurisdiction of the federal and state courts, and the right of the judicial power of the one sovereignty, to control by mandamus the action of tribunals or officers deriving their powers from the other. In such cases, both the state and federal courts are usually averse to granting this extraordinary remedy, when its effect would be to control a person or body owing allegiance to the other jurisdiction, preferring to leave the controversy to be determined in the forum to which it more properly belongs. Indeed, as regards officers of a state, deriving their powers wholly from the state, it may be asserted, generally, that they are beyond the jurisdiction of the federal courts by the

[1] State *v.* Hall, 3 Cold. 255. And see State *v.* Elmore, 6 Cold. 528; Newman *v.* Justices of Scott Co. 1 Heiskell, 787.

[2] Ing *v.* Davey, 2 Lea, 276.

[3] State *v.* Breese, 15 Kan. 123. And see State *v.* County Court of Cooper Co. 64 Mo. 170; State *v.* Supervisors of Juneau Co. 38 Wis. 554.

writ of mandamus, as an original process, although, as we shall hereafter see, these courts may in some cases grant the writ to state officers in aid of an already acquired jurisdiction of the federal tribunals. And the Supreme Court of the United States can not grant the writ against the governor of a state, even for the performance of a duty clearly obligatory upon him by the constitution and laws of the United States, such as the delivery up to another state, upon proper demand, of fugitives from justice.[1]

§ 583 *a*. The state courts will not interfere to supersede or stay the action of officers acting in obedience to a writ of mandamus from a federal court having jurisdiction of the parties and of the subject-matter, since such interference would necessarily result in a conflict between the officers charged with executing the process of the different courts. Thus, when officers are engaged in levying distress warrants for the payment of a tax which has been ordered by mandamus from a federal court, their action will not be superseded by a state court.[2]

§ 584. The right of removal of a cause from the state to the federal courts, by a non-resident defendant sued in the former, has afforded frequent occasion for invoking the extraordinary aid of both the state and federal tribunals. And the doctrine has been asserted, that the superior courts of the different states might properly grant the writ to sub-
* 414 ordinate state courts to compel such removal, when it had been refused, on proper cause shown in conformity with the twelfth section of the judiciary act of 1789.[3] The better-considered doctrine, however, and one which has the support of the undoubted weight of authority, is, that the appellate courts of the different states can not grant the writ to subordinate tribunals, to control, or in any manner interfere

[1] Commonwealth *v.* Dennison, 24 How. 66.

[2] Merchants *v.* City of Memphis, 9 Baxter, 76.

[3] See Brown *v.* Crippin, 4 Hen. & M. 173; State *v.* Judge of Thirteenth District, 23 La. An. 29; Orosco *v.* Gagliardo, 22 Cal. 83.

with their action upon such applications for removal, such a use of the writ being regarded as an abuse of its recognized functions.[1] A distinction, however, is taken in such cases, between the refusal of a state court to order the removal of a cause to the federal tribunal, upon proper cause shown, and its refusal to accept of surety tendered for such removal. And in the latter case, the superior court of the state may grant the writ to an inferior court, commanding it to accept of the surety tendered.[2] And the writ will go from the court of last resort of a state to a subordinate court to compel it to proceed with a cause, which it has declined to hear upon the sole ground of the filing of a petition for removal to the federal court and the docketing of the cause there, the case not being properly removable. And the relief may be granted in such case, notwithstanding the fact that the federal court has enjoined the parties from proceeding with the application for mandamus in the state court.[3]

§ 585. A similar conflict of authority to that noticed in the previous section, has existed as to the right of the federal courts to issue the writ of mandamus to the various state courts of general jurisdiction, for the purpose of compelling the removal of a cause pending therein to the federal tribunal, and the existence of such a power in the circuit courts of the United States, has been asserted as necessary to the proper exercise of their jurisdiction.[4] This conflict of authority, however, has been set at rest by recent decisions of the federal courts, denying the jurisdiction in this class of cases, and it may now be regarded as the settled doctrine,

[1] Francisco *v.* Manhattan Insurance Co. 36 Cal. 283; Shelby *v.* Hoffman, 7 Ohio St. 450; State *v.* Curler, 4 Nev. 445; People *v.* Judges of New York Common Pleas, 2 Denio, 197; People *v.* Judge of Jackson Circuit Court, 21 Mich. 577.

[2] State *v.* Court of Common Pleas, 15 Ohio St. 377.

[3] White *v.* Holt, 20 W. Va. 792.

[4] Spraggins *v.* County Court of Humphries, Cooke, 160; People *v.* Judges of New York Common Pleas, 2 Denio, 197. See also opinion of CAMPBELL, J., in People *v.* Judge of Jackson Circuit Court, 21 Mich. 577.

that they will not issue the writ to compel state courts to transfer causes to the federal tribunals. And, although it is believed to be within the power of congress to confer * 415 such a jurisdiction upon the circuit courts of the United States, yet these tribunals are powerless to grant the writ in such cases, either under the judiciary act of 1789, or under the act of 1866,[1] providing for the removal of cases from the state to the federal courts, upon proper cause shown.[2]

§ 586. It is proper, however, for the state courts to grant the writ of mandamus in aid of a decree rendered in the federal courts, when an appropriate case for the exercise of the jurisdiction is presented.[3] And the state courts will issue the writ to the authorities of a municipal corporation, for the purpose of compelling the levy of a tax, to satisfy a judgment recovered against the municipality in the courts of the United States.[4] So, too, a state court may properly grant the writ against a county treasurer, to enforce the performance of his duty in the payment of a judgment, out of funds collected for that purpose, although the judgment was recovered in the United States courts.[5] But a mandamus from a federal court to state officers, commanding them to levy a tax for the payment of judgments, can have no effect when such officers are not authorized under the laws of the state to levy such tax.[6]

§ 587. The jurisdiction of the Supreme Court of the United States, by the writ of mandamus, is limited, under the constitution, to cases where its exercise is necessary in aid of the appellate powers of the court, and it can not grant

[1] 14 U. S. Statutes at Large, 306.

[2] Hough v. Western Transportation Company, 1 Bissell, 425; *In re* Cromie, 2 Bissell, 160; Ladd v. Tudor, 3 W. & M. 326.

[3] Conrad v. Prieur, 5 Rob. La. 49; Benjamin v. Prieur, 8 Rob. La. 193; Diggs v. Prieur, 11 Rob. La. 54.

[4] State v. City of Madison, 15 Wis. 30; State v. Supervisors of Beloit, 20 Wis. 79.

[5] Brown v. Crego, 32 Iowa, 498.

[6] Graham v. Parham, 32 Ark. 676.

the writ as the exercise of an original jurisdiction. The constitution having limited the original jurisdiction of this court to "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party," and having expressly declared that, in all other cases, it shall exercise only an appellate jurisdiction,[1] it is powerless to grant the writ, except in cases where it is necessary to the proper exercise of its appellate powers.[2] Nor is it competent for the legislative department of the government to extend this jurisdiction, beyond the limits fixed by the constitution, and that portion of the judiciary act of * 416 1789,[3] which attempts to confer upon the Supreme Court the power to issue writs of mandamus to persons holding office under the United States, is plainly repugnant to the constitution. This court will not, therefore, issue the writ to the secretary of state of the United States, even to command the performance of a clear and unquestioned duty on the part of that officer, ministerial in its nature and involving the exercise of no official discretion.[4]

§ 588. The aid of the Supreme Court of the United States has seldom been invoked for the issuing of * 417 writs of mandamus to inferior courts. It has, however, granted the writ to a district court of the United States, to compel the latter to execute its decree, which a state legislature had attempted to annul.[5] And the writ * 418 has also been granted by the Supreme Court, to the United States court of claims, requiring the latter to hear

[1] Const. Art. III, Sec. II.

[2] Marbury v. Madison, 1 Cranch, 49.

[3] 1 U. S. Statutes at Large, 73.

[4] Marbury v. Madison, 1 Cranch, 49. The limits to the jurisdiction of the Supreme Court, in cases of mandamus, are very clearly defined in this case, which was an application to the court for a rule against the secretary of state, to show cause why a mandamus should not issue, commanding him to deliver to the relators their commissions, as justices of the peace for the District of Columbia.

[5] United States v. Peters, 5 Cranch, 115.

and determine a motion for a new trial.[1] So mandamus has been granted by the Supreme Court, to a district court of the United States to compel the latter to reinstate a case, which it had dismissed on the ground that the pleadings did not disclose the value of the matter in dispute, thereby failing to present a case falling within the jurisdiction of the district court.[2]

§ 589. As regards the jurisdiction of the circuit courts of the United States in mandamus, it is to be observed that their power to grant the writ is limited, under the judiciary act of 1789, to cases where it is necessary to the exercise of their general jurisdiction as conferred by law. In other words, the fourteenth section of the act of 1789, authorizing these courts to issue "writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," is construed as a limitation upon the power of the circuit courts over the writ of mandamus, confining it solely to cases where the writ is sought as ancillary to a jurisdiction already acquired. They will not, therefore, entertain proceedings in mandamus, or grant the writ, in any case where it is not a necessary adjunct to the exercise of a jurisdiction which they already possess.[3] Nor is the jurisdiction of the circuit courts by way of mandamus enlarged by the act of congress of 1875.[4] And the same restriction applies
* 419 to the district courts of the United States, and these courts can not grant the writ as the exercise of an

[1] *Ex parte* United States, 16 Wal. 699.

[2] *Ex parte* Bradstreet, 7 Pet. 634. See S. C. 8 Pet. 588.

[3] McIntire *v.* Wood, 7 Cranch, 504; Smith *v.* Jackson, 1 Paine, 453; Bath County *v.* Amy, 13 Wal. 245; Graham *v.* Norton, 15 Wal. 427.

[4] American Union Telegraph Co. *v.* Bell Telephone Co. 1 McCrary, 175. McIntire *v.* Wood, 7 Cranch, 504, is the leading case in support of the doctrine of the text. The opinion of the court by Mr. Justice JOHNSON, is as follows: "I am instructed to deliver the opinion of the court in this case. It comes up on a division of opinion in the cir-

original jurisdiction, but only in aid of their existing powers as conferred by law.[1] The authorities, however, clearly recognize the judicial power of the government to extend the remedy by mandamus to its own officers, treating it as a dormant power, not yet called into action or conferred upon the circuit courts.[2] And the circuit court of the District of Columbia is invested with original jurisdiction in mandamus, its powers in this regard being greater than those of the circuit courts of the United States.[3]

§ 590. Where, however, the circuit courts of the United States have properly acquired jurisdiction of a subject, and

cuit court of Ohio, upon a motion for a mandamus to the register of the land office, at Marietta, commanding him to grant final certificates of purchase to the plaintiff, for lands to which he supposed himself entitled under the laws of the United States. This court is of opinion that the circuit court did not possess the power to issue the mandamus moved for. Independent of the particular objections which this case presents from its involving a question of freehold, we are of opinion that the power of the circuit courts to issue the writ of mandamus, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction." In an earlier case, also decided by Mr. Justice JOHNSON, sitting as a circuit judge, in the United States Circuit Court for the district of South Carolina, in 1808, a mandamus was granted to the collector of the port of Charleston to issue a clearance to a vessel. Gilchrist *v.* Collector, 1 American Law Journal, 429. But the question of jurisdiction does not appear to have been discussed or considered, and the case has never been recognized as authoritative. Commenting upon his earlier decision, Mr. Justice JOHNSON, in McIntire *v.* Wood, 7 Cranch, 504, above quoted, says: "A case occurred some years since in the circuit court of South Carolina, the notoriety of which may apologize for making an observation upon it here. It was a mandamus to a collector to grant a clearance, and unquestionably could not have been issued but upon a supposition inconsistent with the decision in this case. But that mandamus was issued upon the voluntary submission of the collector and the district attorney, and in order to extricate themselves from an embarrassment resulting from conflicting duties. *Volenti non fit injuria.*".

[1] United States *v.* Smallwood, 1 Chicago Legal News, 321, decided in the U. S. District Court for Louisiana.

[2] See McIntire *v.* Wood, 7 Cranch, 504; McCluny *v.* Silliman, 2 Wheat. 369; McClung *v.* Silliman, 6 Wheat. 598; Kendall *v.* The United States, 12 Pet. 524; Marbury *v.* Madison, 1 Cranch, 49.

[3] Kendall *v.* United States, 12 Pet. 524.

the aid of a mandamus is necessary to enable them to
* 420 properly carry out their jurisdiction, and to afford the necessary relief to which the parties are legally entitled, the right to issue the writ is regarded as clearly established, the authority of the courts, in such cases, being derived from the fourteenth section of the act of 1789, already referred to. Cases of this nature have frequently occurred, where the aid of mandamus has been sought to compel municipal corporations to provide for the payment of judgments upon municipal bonds and securities, issued in aid of railway and other kindred enterprises of a quasi-public nature. And the doctrine is clearly established, that when such judgments have been recovered in the circuit courts of the United States, these tribunals may issue writs of mandamus, to compel the municipal authorities to levy a tax in satisfaction of the judgments, the writ being regarded as the only remedy, within the constitutional powers of the federal courts, adequate to such an emergency.[1] And in this class of cases the writ of mandamus is neither a prerogative writ nor a new suit in the jurisdictional sense, but is a proceeding ancillary to the judgment which gives the jurisdiction, and the writ when issued becomes a substitute for the ordinary process of execution to enforce a judgment.[2]

[1] Commissioners of Knox Co. v. Aspinwall, 24 How. 376; United States v. Treasurer of Muscatine Co. 2 Abb. U. S. 53; S. C. *sub nom.* Lansing v. County Treasurer, 1 Dill. 522; Welch v. St. Genevieve, Ib. 130; Rusch v. Supervisors of Des Moines Co. Woolworth, 313. See also United States v. Supervisors of Lee Co. 2 Bissell, 77, 1 Chicago Legal News, 121; Riggs v. Johnson Co. 6 Wal. 166; Rees v. City of Watertown, 19 Wal. 107, 6 Chicago Legal News, 221.

[2] Riggs v. Johnson Co. 6 Wal. 166.

PART II.

QUO WARRANTO, PROHIBITION.

THE

LAW OF QUO WARRANTO.

CHAPTER XIII.

OF THE ORIGIN AND NATURE OF THE JURISDICTION IN QUO WARRANTO.

§ 591. Information in the nature of a quo warranto defined.
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622. Statutes to be construed as remedial.

§ 591. The modern information in the nature of a * 424 quo warranto may be defined as an information, criminal in form, presented to a court of competent jurisdiction, by the public prosecutor, for the purpose of correcting the usurpation, mis-user, or non-user, of a public office or corporate franchise. The object of the information, as now employed both in the courts of England and America, is substantially the same as that of the ancient writ of quo warranto, and while still retaining its criminal form, it has long since come to be regarded as, in substance, a civil proceeding, instituted by the public prosecutor, upon the relation of private citizens, for the determination of purely civil rights. The use of the quo warranto information having entirely superseded the original writ in England, as well as in most of the states of this country, and the objects to be attained by the modern remedy being identical with those secured by the ancient writ, a brief sketch of the functions of the former remedy and of its growth, development, and decline, is necessary to a proper understanding of the remedy which has taken its place.

§ 592. The ancient writ of quo warranto was a high prerogative writ, in the nature of a writ of right for the king, against one who usurped or claimed any office, franchise or liberty of the crown, to inquire by what authority he sup-

ported his claim, in order to determine the right. It was also granted as a corrective of the mis-user, or non-user of a franchise, and commanded the respondent to show by what right, "*quo warranto*," he exercised the franchise, having never had any grant of it, or having forfeited * 425 it by neglect or abuse.[1] Being an original writ, it issued out of chancery, and was directed to the sheriff, commanding him to summon the respondent to appear before the king's justices at Westminster. Afterwards, by virtue of the statutes of quo warranto,[2] the writ was made returnable before the king's justices in eyre, and the respondent was commanded to appear before the king or these justices when they should come into the county, to show by what warrant the office or franchise in question was exercised. The justices in eyre having been displaced by the judges on the several circuits, the proceedings were again remanded to the king's justices at Westminster, and the original writ gradually fell into disuse.[3]

§ 593. The origin of the writ may be traced to a very early date in the history of the common law. The earliest case upon record is said to have been in the ninth year of Richard I., A. D. 1198, and was against the incumbent of a church, calling upon him to show "*quo warranto*" he held the church.[4] It was frequently employed during the feudal period, and especially in the reign of Edward I., to strengthen the power of the crown at the expense of the barons. Indeed, to such an extent had the encroachments of the crown been carried, that, prior to the statutes of quo warranto, the king had been accustomed to send commissioners over the

[1] 3 Black. Com. 262. And see Commonwealth v. Small, 26 Pa. St. 31; State v. Ashley, 1 Ark. 279; Com. Dig. Quo Warranto (A). In the code of practice of Louisiana, article 828, the writ of quo warranto as used in that state is defined as an "order of which the object is to prevent a usurpation."

[2] 6 Edw. I. ch. 2; 18 Edw. I. st. 2. See Appendix, D, E, *post*.

[3] See 3 Black. Com. 262; State v. Stewart, 32 Mo. 379.

[4] See opinion of Lord Chief Justice TINDAL, in Darley v. The Queen, 12 Cl. & Fin. 520.

kingdom to inquire into the title to all franchises, *quo jure et quove nomine illi retinerent*, and the franchises being grants from the crown, if no sufficient authority could be shown for their exercise, they were seized into the king's hands, often without any judicial process.[1] These encroachments of the royal prerogative having been limited and checked by statute, resort was then had to the original * 426 writ of quo warranto. Indeed, both the original writ and the information in the nature thereof were crown remedies, and although often unreasonably narrowed in the hands of weak princes, they were always recognized as of most salutary effect in correcting the abuse or usurpation of franchises.[2]

[1] See 2 Inst. 280.

[2] See opinion of Mr. Justice COWEN, in People *v.* Bristol & Rensselaerville Turnpike Co. 23 Wend. 222. "In times of feudal barbarity," says the learned Judge, "which accompanied and followed for many years the overgrown power of the nobles, there was constant occasion to apply the corrective of the quo warranto. It was the only effectual remedy, even if it could be called a remedy in itself; for monopolies had become so numerous, and so fortified by interest and power, that the application of the writ depended in greater measure on the personal character of the prince than moral submission to the law. This was especially so when the writ was brought to bear upon manorial claims residing in the hands of the barons or lords either temporal or spiritual. Looking at Keilwey's reports of 'cases in eyre, in time of the very memorable king Richard the Third,' fol. 137 to 152, one would be led to believe that a good deal of his reign was devoted to this sort of judicial contest with his nobles. Indeed his predecessor, Edward the First, had found single writs too slow, and caused a statute to be passed under which his noblemen were called by proclamation, and obliged to come by squadrons before his immediate court or his justices in eyre whenever they entered the county. 2 Reeves' Hist. 220. Dubl. ed. 1787; Com. Dig. Quo Warranto (C. 2); Crabb's History of Engl. Law, 174, 5. This bearing too much the appearance of plunder, another statute was passed, somewhat moderating the preceding, and bringing it back to about the common-law course. 2 Reeves' Hist. 221; Crabb, *supra*. This is the statute on which Sir EDWARD COKE has furnished us with a labored commentary in his 2 Inst. 294. Still, as appears from the history of the times, the writ continued to be a very common resort, and to have been almost avowedly used to strengthen the crown at the expense of the barons. It was sometimes extended even to lands, though

§ 594. By the statutes of quo warranto,[1] to which allusion has already been made, the encroachments of the crown were much restricted, and an examination of the provisions of these statutes is necessary to a correct understanding of the history of the jurisdiction in quo warranto. * 427 The statute 6 Edward I., commonly known as the statute of Gloucester, from the place where parliament then sat, and which was enacted in the year 1278, provided that all persons should enjoy their franchises, for the examination of which a day had been already fixed, until the coming of the king or his justices in eyre, before whom a quo warranto lay. As to all other persons, the sheriff was required to make proclamation forty days before the coming of the justices in eyre, that all those who held liberties or franchises should appear before the justices, and show "*quo warranto*," they held them. If any party failed to appear, his franchises were seized into the king's hands until he should appear, *nomine districtionis*, and replevy the franchise, which he might do at any time while the eyre sat in that county, in default of which his franchise was forever forfeited. If any one appeared and objected that he was not bound to answer without an original writ, the inquiry then was, whether he had usurped his franchise, and if this were shown he was required to answer immediately, without any original writ. If it were found that his ancestor died seized of the franchise, an original writ was issued commanding him to appear "*in proximo adventu nostro, vel coram justiciariis nostris ad proximam assisam cum in partes illas venerint, ostensurus quo warranto tenet*," etc. To this writ the party made answêr, and replication and rejoinder followed. The statute

COKE showed that its proper office respected franchises only." Although the strictures of the learned justice upon the first statute of quo warranto, that of 6 Edw. I. ch. 2, are hardly justified by a perusal of that statute, yet, in the main, his observations upon the origin and nature of the remedy are deserving of attention.

[1] 6 Edw. I. ch. 2; 18 Edw. I. st. 2. See Appendix, D, E, *post*.

also allowed the respondent such reasonable delay as might be granted in the discretion of the justices, as in ordinary personal actions.[1]

§ 595. Lord COKE assigns as the cause leading to the passage of this statute, that the king, being in pressing need of money, had been persuaded that few or none of the nobility, clergy, or commonalty, holding franchises under grant from the crown, could produce any charters as evidence of their grants, since most of their charters were either destroyed by wars and insurrections, or lost by lapse of
* 428 time. He had, therefore, sent proclamations throughout the kingdom, directing that all persons claiming liberties or franchises by grant from any of his predecessors, should show before certain persons, nominated for that purpose, by what right or authority they held such liberties or privileges, the result of which was, that many franchises which had long been held and enjoyed in quiet possession were seized into the hands of the crown. The king at length, finding that he had given heed to evil counsels, and mindful of the provisions of magna charta, and being moved especially by petition of the lords and commons in parliament assembled, enacted this statute, for the purpose of redressing the grievances under which his subjects had suffered, by reason of the continued encroachments of the royal prerogative.[2]

§ 596. Notwithstanding the statute of Gloucester, the method of conducting proceedings in quo wrrranto was still far from satisfactory to the subject. It is true that the harrassing and vexatious mode of inquiry, under which he had recently suffered, was done away with, and he was no longer subject to the scrutiny of a body of select commissioners, appointed by the crown to examine into the tenure by which he held his franchises and liberties. Instead of this

[1] 1 English Statutes at Large, p. 129. And see Appendix, D, *post;* Com. Dig. Quo Warranto, C. I. C. 2; Crabb's English Law, ch. XIII. p. 175; 2 Inst. 277 *et seq.*

[2] 2 Inst. 280.

arbitrary and uncertain method of procedure, an established tribunal was provided, whose duty it was to determine judicially the rights of the subject and the tenure by which they were held. He was still liable, however, to be summoned by a general proclamation at the hands of the sheriff, without any specific complaint or charges being tendered, to come before the king's itinerant justices, and to disclose what franchises he held, as well as the title by which they had been acquired. In addition to this, great delay was experienced in the proceedings, owing to the fact that the justices were frequently in the habit of deferring judgment until they should be apprised of the king's pleasure in the matter. Moreover the costs and expenses of hearing pleas in quo warranto in cases determined at Westminster, being a grievous burden, it was deemed advisable that * 429 the subject might receive justice in his own county, and that pleas of quo warranto should be heard and determined in the eyres or circuits of the justices.[1]

§ 597. These grievances, being complained of by the lords spiritual and temporal and the commons, led to the passage of the statute of 18 Edward I., enacted in the year 1290, and known as the statute *de quo warranto novum*, in distinction from the statute of Gloucester. This act, after reciting the delays which had been experienced in proceedings in quo warranto, declared that the king, of his special grace and for the affection which he bore to his prelates, earls, barons and others of his realm, granted that all under his allegiance, who could verify by inquest of the country, or otherwise, that they and their ancestors had used any liberties, whereof they were impleaded in quo warranto, before the time of Richard I., or in his time, should be adjourned unto a certain day before the justices, within which time they might go to the king, who should confirm their liberties by letters patent. Such persons as could not establish seisin of the franchises or liberties in their ancestors or predecessors,

[1] See 2 Inst. 495 *et seq.*

were to be adjudged according to law and the custom of the realm, and such as held charter evidence of their rights were to be adjudged according to their charters. The statute further declared that the king had granted, for the purpose of sparing the costs and expenses of his people, that pleas of quo warranto should thenceforth be pleaded and determined in the circuits of the justices, and that all pleas then pending should be adjourned into their shires, until the coming of the justices therein.[1] The effect of this important statute, which was deemed an act of concession from the sovereign to the subject, was to weaken the prerogative powers of the former, and, to the same extent, to fortify the rights and privileges of the latter. And in all cases where it appeared that the respondent to the writ had enjoyed, time whereof the memory of man ran not to the contrary, certain franchises resting in prescription, or, in cases of franchises * 430 claimed under charter, if a grant could be shown within the time of Richard I., or, if a grant prior to that time could be shown to have been confirmed and allowed since, the respondent could not be ousted.[2]

§ 598. These statutes have been incorrectly supposed by some authorities to be the origin and foundation of proceedings in quo warranto. The better doctrine undoubtedly is, that they were intended merely to regulate an existing jurisdiction, by pruning it of its harsher and more oppressive features, and that, so far from creating a new jurisdiction or a new remedy, they were only declaratory of an existing course of procedure, which they attempted to regulate and improve. Indeed, this conclusion is inevitable from a perusal of the statutes themselves, and satisfactory evidence exists of the use of the writ at a period long anterior to the date of

[1] 18 Edw. I. st. 2, 1 English Statutes at Large, p. 257, Appendix, E, *post*. And see 2 Inst. 494; Com. Dig. Quo Warranto, B; Crabb's English Law, ch. XIII, p. 175.

[2] See Com. Dig. Quo Warranto B; Crabb's English Law, ch. XIII, p. 175.

these enactments.[1] Their chief purpose seems to have been to shape an existing remedy, so that it might more effectually insure justice to the subject, by restraining the excesses of the royal prerogative, and by affording him a more convenient forum for the protection of his franchises, in the county where he resided, instead of compelling his attendance before the king's justices at Westminster.

§ 599. The precise period of time when this ancient writ fell into disuse in England, and its place was usurped by the more modern remedy of an information in the nature of a quo warranto, can not be definitely ascertained. It is certain, however, that the information, itself a common-law remedy, was of very early date,[2] and it is probable that it began to supersede the more ancient remedy upon the abolition of the circuits of the king's justices in eyre, and the substitution in lieu thereof of the justices of assize.[3] The authorities differ as to the exact time when the circuits in * 431 eyre were abolished, Sir MATTHEW HALE fixing the period of their abolition at about the tenth year of Edward III. Lord COKE, however, places the period much later, basing his opinion upon an act of parliament subsequent to that time, providing that no eyres should be held during two years, and upon a statute of the sixteenth year of Richard II., enacting that no eyre should be held until the next parliament.[4] All the authorities, however, seem to agree that the abolition of these justices itinerant was the probable period when the ancient remedy began to fall into disuse. And this view of the case derives additional support from the fact that that clause of the statute of 18th Edward I., authorizing pleas of quo warranto to be heard and determined in the circuits of the justices, necessarily expired when these

[1] Crabb's English Law, ch. XIII, p. 175; Darley v. The Queen, 12 Cl. & Fin. 520, opinion of Lord Chief Justice TINDAL.

[2] See opinion of Lord Chief Justice TINDAL, in Darley v. The Queen, 12 Cl. & Fin. 520.

[3] See Crabb's English Law, ch. XVIII, p. 277; 2 Inst. 498; State v. Stewart, 32 Mo. 379.

[4] 2 Inst. 498.

to the effect that his prorogation of parliament had obstructed public justice, was a scandalous and libellous petition and a forfeiture of the corporate franchise. Another ground of forfeiture was the imposition of certain tolls upon goods brought into the city markets, by virtue of an ordinance or by-law of the municipality. Upon such frivolous grounds as these the franchises of the oldest municipality in the kingdom were seized into the hands of the crown, and like proceedings, for causes no less frivolous, were had against many of the principal municipal corporations throughout England. To such lengths was this abuse of the jurisdiction carried by the house of Stuart, that it is said that no less than eighty-one quo warranto informations were presented against municipal corporations during the reigns of Charles II. and James II. These continued encroachments of the royal prerogative, although justified by BLACKSTONE,[1] were productive of such serious alarm that after the revolution the judgment against the city of London was reversed by statute, and it was provided by the same act that the franchises of the city should never be seized for any misdemeanor or forfeiture.[2]

§ 602. Prior to the statute of Anne,[3] the information in the nature of a quo warranto was employed exclusively as a prerogative remedy, to punish a usurpation upon the franchises or liberties granted by the crown, and it was never used as a remedy for private citizens, desiring to test the title of persons claiming to exercise a public franchise. And although such informations were exhibited by the king's * 434 attorney general long prior to this statute, yet the remedy thereby given was never enlarged beyond the limits prescribed for the orginal writ of quo warranto, which extended only to encroachments upon the royal prerogative. Hence the information, as a means of investigating and determining civil rights between parties, may be said to owe its

[1] See 3 Black. Com. 264.

[2] 2 William & Mary, ch. 8, 9 English Statutes at Large, 79.

[3] 9 Anne, ch. 20. See Appendix, A.

origin to the statute of Anne, which authorized the filing of the information, by leave of court, upon the relation of any person desirous of prosecuting the same, for usurping or intruding into any municipal office or franchise in the kingdom.[1] The object of this statute, in as far as concerns the usurpation of corporate franchises, is said to have been the promotion of speedy justice against such usurpation, as well as to quiet the possession of those who were lawfully entitled to the franchise.[2] And it was doubtless intended to be confined to such franchises as were claimed in cases affecting corporate rights, or rights to freedom in municipal corporations, and not to be extended to all offices or franchises, exercised without authority from the crown within a corporation. And the word "franchises," as used in the act, has been construed by the court of kings bench, to mean only the freedom and right of membership in the corporation.[3]

§ 603. The original writ of quo warranto was strictly a civil remedy, prosecuted at the suit of the * 435 king by his attorney general, and in case of judgment for the king, the franchise was either seized into his hands,

[1] See State *v.* Ashley, 1 Ark. 279. See also 9 Anne, ch. 20, sec. 4, Appendix, A, *post.*

[2] Rex *v.* Wardroper, Burr. 1964.

[3] Rex *v.* Williams, Burr. 402. Lord MANSFIELD, in commenting upon the statute of Anne, in this case, observes: "The act is meant to extend to all officers or corporations as such; and, as far as relates to all the corporate rights of the burgesses and freemen, it is very legally, clearly, and correctly drawn. But it is not within the reason or meaning of the act, that it should extend generally to all offices or franchises exercised without authority from the crown, within a corporation. It was meant to be confined to such franchises as were claimed in instances affecting those rights between party and party." And Mr. Justice DENISON observes: * * * "There are numbers of offices which a man may usurp and be liable to an information for usurping which are not franchises in corporations. But these 'franchises' mentioned in the act mean corporate rights, or rights to freedom in corporations." Mr. Justice FOSTER says: "The word 'franchises,' in the act, means only freedoms and rights to be members of the corporation. This act was drawn with great care and attention. (Judge POWELL was the person who drew it.) And there is no reason to extend it beyond its intention."

if of such a nature as to subsist in the crown, or a mere judgment of ouster was rendered to eject the usurper.[1] No fine was imposed, nor was any other punishment inflicted than that implied in the deprivation of the franchise, which had been improperly usurped or illegally exercised.[2] The information was originally regarded as a criminal proceeding, in which the usurpation of the office or franchise was charged as a criminal offense, and the offender was liable upon conviction to a fine and imprisonment, as well as the loss of the franchise which he had usurped. In modern times, however, the information, as a means of criminal prosecution, has entirely fallen into disuse, and it has come to be regarded as a purely civil remedy, which, while partaking in some of its forms and incidents of the nature of criminal process, is yet a strictly civil proceeding, resorted to for the purpose of testing a civil right, by trying the title to an office or franchise and ousting the wrongful possessor.[3] Indeed, to such an extent has the remedy come to be regarded as purely a civil one, that it is held not to fall within the prohibition of the restrictive clauses contained in the constitution or bill of

[1] See 3 Black. Com. 263; State *v.* Ashley, 1 Ark. 279.

[2] See State *v.* Ashley, 1 Ark. 279.

[3] State *v.* Hardie, 1 Ired. 42; State Bank *v.* The State, 1 Blackf. 267: State *v.* Ashley, 1 Ark. 279; Lindsey *v.* Attorney General, 33 Miss. 508; State *v.* Lingo, 26 Mo. 496; State *v.* Stewart, 32 Mo. 379; State *v.* Lawrence, 38 Mo. 535; State *v.* Kupferle, 44 Mo. 154; Commonwealth *v.* Birchett, 2 Va. Cas. 51; Attorney General *v.* Barstow, 4 Wis. 567; Commonwealth *v.* Commissioners, 1 S. & R. 382; Commonwealth *v.* M'Closkey, 2 Rawle, 381, opinion of GIBSON, C. J.; State *v.* Price, 50 Ala. 568; State *v.* De Gress, 53 Tex. 387. In Illinois, however, the information is still regarded as a mode of criminal prosecution, for the two-fold purpose of punishing the usurper and ousting him from the franchise usurped, and the rules of pleading applicable to criminal indictments are applied to informations. Donnelly *v.* The People, 11 Ill. 552; People *v.* Mississippi & Atlantic R. Co. 13 Ill. 66; Wight *v.* The People, 15 Ill. 417. And in Illinois, the information should run "in the name and by the authority of the people of the State of Illinois," and the omission of these words is sufficient ground for quashing the information. Hay *v.* The People, 59 Ill. 94.

rights of many of the states, providing that no citizen shall be called to answer any criminal charge, except by presentment, indictment, or impeachment. Such restrictions, it is held, do not have the effect of prohibiting the in- * 436 formation in the nature of a quo warranto, since it is at the most a criminal proceeding only in form and name, its primary object being, not the infliction of pains and penalties as in ordinary criminal proceedings, but to prevent the wrongful usurpation or abuse of an office or franchise.[1]

§ 604. In considering the nature and purpose of the information in the nature of a quo warranto, it is to be premised that it does not create an office or franchise, but is merely declaratory of existing rights, the court being the medium for declaring and enforcing rights already existing by law. Nor does it command the performance of his official functions by any officer to whom it may run, since it is not directed to the officer as such, but always to the person holding the office or exercising the franchise, and then not for the purpose of dictating or prescribing his official duties, but only to ascertain whether he is rightfully entitled to exercise the functions claimed.[2]

§ 605. In England, the former practice of the court of kings bench seems to have been, to grant informations in the nature of a quo warranto almost as a matter of course. Indeed, to such an extent had the granting of these informations been carried, that it was often deemed prudent not to show cause against the rule *nisi*, lest the respondent should there-

[1] State Bank *v.* The State, 1 Blackf. 267; State *v.* Hardie, 1 Ired. 42. In People *v.* Gillespie, 1 Cal. 342, the information is regarded as a mixed action for the double purpose of vindicating public policy and of enforcing a private remedy.

[2] Attorney General *v.* Barstow, 4 Wis. 659, 773. Mr. Justice SMITH observes, p. 773: "It is foreign to the objects and functions of the writ of quo warranto to direct any officer what to do. It is never directed to an officer as such, but always to the person—not to dictate to him what he shall do in his office, but to ascertain whether he is constitutionally and legally authorized to perform any act in, or exercise any functions of the office to which he lays claim."

by disclose his grounds of defense. Gradually, however, the kings bench became more cautious in granting leave to file the information, and would only do so after considering all the circumstances of the case.[1] And the principle
* 437 is now firmly established, that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made, even though there is a substantial defect in the title by which the office or franchise is held.[2] In the exercise of this discretion, upon the application of a private relator, it is proper for the court to take into consideration the necessity and policy of allowing the proceeding, as well as the position and motives of the relator in proposing it, since this extraordinary remedy will not be allowed merely to gratify a relator who has no interest in the subject of inquiry.[3] The court will also weigh the considerations of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application.[4] And whenever it is apparent that the filing of the information would result in no practical benefit, as where there is no one claiming the office in opposition to the respondent, and the term will expire before a trial of the right can be had, or where a new election for the office is about to occur, which will afford full redress to the relators, the court may properly refuse the application for

[1] King *v.* Stacey, 1 T. R. 1.

[2] People *v.* Waite, 6 Chicago Legal News, 175, 70 Ill. 25; People *v.* Moore, 78 Ill. 132; People *v.* Callaghan, 83 Ill. 128; People *v.* North Chicago R. Co. 88 Ill. 537; People *v.* Keeling, 4 Col. 129; State *v.* Tolan, 4 Vroom, 195; State *v.* Schnierle, 5 Rich. 299; State *v.* Centreville Bridge Co. 18 Ala. 678; State *v.* Fisher, 28 Vt. 714; State *v.* Smith, 48 Vt. 266; Commonwealth *v.* Reigart, 14 S. & R. 216; State *v.* Brown, 5 R. I. 1. And see Stone *v.* Wetmore, 44 Geo. 495; Commonwealth *v.* Jones, 12 Pa. St. 365; Commonwealth *v.* Cluley, 56 Pa. St. 270; People *v.* Sweeting, 2 Johns. Rep. 184. But see State *v.* Burnett, 2 Ala. 140.

[3] State *v.* Brown, 5 R. I. 1.

[4] State *v.* Schnierle, 5 Rich. 299.

leave to file an information.[1] The expediency of permitting the information to be filed is also a proper matter for the consideration of the court, and the fact that a successful prosecution of the proceedings, which are brought to test the title to a municipal office, may result in the suspension of all municipal government in the city for a long period of time, may properly be taken into account in * 438 deciding upon the application.[2] And to warrant the court in granting leave to file the information it should appear that there is probable ground for maintaining the proceeding.[3] So when the relief is sought upon the ground of an informality in the election of respondent to the office in question, but the relator himself participated in the election without objection, the court, in the exercise of its discretion, may properly refuse to allow the filing of an information.[4]

§ 606. The right of the court to exercise its discretion, in granting or withholding leave to file an information, is not limited, even by a statute authorizing the granting of the remedy at any time on "proper showing made." The spirit of such a statute is held to contemplate the right of the court to refuse the application, if it shall see fit, and since the remedy is in no sense a matter of absolute right, on the part of a claimant to an office, he must, notwithstanding such a statute, present to the court such facts as will enable it to decide the right to the office in question.[5] It is, however, important to observe that when the court has, in the exercise of its discretion, allowed the information to be filed, it has exhausted its discretionary powers, and the issues of fact and of law presented by the pleadings must then be tried and determined in accordance with the strict rules of law, in

[1] People v. Sweeting, 2 Johns. Rep. 184; State v. Schnierle, 5 Rich. 299; Commonwealth v. Reigart, 14 S. & R. 216. See also State v. Centreville Bridge Co. 18 Ala. 678.

[2] State v. Tolan, 4 Vroom, 195; People v. Keeling, 4 Col. 129.

[3] People v. Callaghan, 83 Ill. 128.

[4] People v. Waite, 70 Ill. 25; People v. Moore, 73 Ill. 132.

[5] Stone v. Wetmore, 44 Geo. 495.

the same manner and with the same degree of strictness as in ordinary cases.[1]

§ 607. In Alabama, a distinction is taken, in applying the doctrine of judicial discretion above considered, between cases where the proceedings retain the character of a prosecution in behalf of the state, where the franchise or office in controversy involves no question of private right, as in cases of corporations, and cases where only private rights are involved. And it is held that the doctrine of discretion should be limited to the former class of cases, and that when the application is made in behalf of one claiming the right to a particular office or franchise, it is to be considered rather as a matter of right than of discretion.[2]

§ 608. Informations in the nature of a quo warranto as now used in England, in lieu of the ancient writ, are of two kinds: first, such as are exhibited by and in the name of the attorney-general, *ex officio*, without any relator, and which are filed without leave of the court and without entering into any recognizance; second, informations in the name of the * 439 queen's coroner and attorney, sometimes known as the master of the crown office, upon the relation of private citizens. The latter class can only be filed by leave of court first obtained for that purpose, as provided by the statute of Anne,[3] and by entering into a recognizance in conformity with the statute 4 and 5 William and Mary, ch. 18. The most frequent use to which the information is put in England is to determine the right to municipal offices and franchises, and its use as a means of testing the title to the franchises of private corporations in that country is of comparatively rare occurrence.

§ 609. In this country, the principles governing the jurisdiction under discussion have been somewhat confused, by the failure of many of the courts to properly discriminate between the original or ancient writ of quo warranto, and

[1] State *v.* Brown, 5 R. I. 1.

[2] State *v.* Burnett, 2 Ala. 140.

[3] 9 Anne, ch. 20, Appendix A, *post.*

the information in the nature of a quo warranto, and the terms have been often used as synonymous and convertible terms. The distinctive features of the two remedies are clearly defined and have already been noticed.[1] And although the quo-warranto information has almost entirely usurped the place of the original writ, yet the latter is, in substance, still recognized and employed as an existing remedy in some of the states of this country.[2] But whether resort is had to the ancient writ of quo warranto, or any process analogous thereto, or to the more modern and convenient remedy by information, the object of the proceeding is substantially one and the same, viz., to correct the usurpation, non-user or misuser of a public office or of a corporate franchise. And it is doubtless due to the comparatively short tenure of most offices in this country, as well as to the method of popular elections which forms the distinctive feature of the American system, that the jurisdiction is more frequently invoked for the determination of disputed questions of title to public offices, in this country, than for all other causes combined.

§ 610. In most of the states of this country, the jurisdiction is fixed by constitutional provisions, pre- * 440
scribing the courts which shall be empowered to grant the relief. And the authorities are somewhat conflicting as to the precise nature of the remedy intended to be conferred, since the terms writ of quo warranto and information in the nature of a quo warranto have been frequently used as interchangeable and synonymous terms. In Wisconsin, the doctrine is maintained that the two terms, as now generally used in this country, are to be understood as synonymous, and that the grant of power in the constitution of the state, authorizing the supreme court of the state to issue writs of quo warranto, is not to be limited or confined to the ancient

[1] See State v. Ashley, 1 Ark. 279.

[2] See State v. Ashley, 1 Ark. 279; State v. St. Louis Insurance Co. 8 Mo. 330. See also Commonwealth v. Burrell, 7 Pa. St. 34.

common-law remedy of that name, but that it is applicable to all cases where the information has been recognized as the appropriate remedy according to the established usages of the common law. And the remedy by information in the nature of a quo warranto having long since taken the place of the ancient writ, it is held that the clause of the constitution conferring the power to grant writs of quo warranto, must be construed with reference to the established jurisdiction of the courts by the quo-warranto information, and that to this jurisdiction reference must be had in determining the powers of the court under the constitution, rather than to the jurisdiction by the ancient writ of quo warranto.[1]

[1] State *v.* West Wisconsin R. Co. 34 Wis. 197. And see S. C. 36 Wis. 466. See also Attorney-General *v.* Blossom, 1 Wis. 317; Attorney General *v.* Barstow, 4 Wis. 567; State *v.* Messmore, 14 Wis. 115; State *v.* Baker, 38 Wis. 71. By section 3, article VII, of the constitution of Wisconsin, it is provided that the supreme court of the state shall "have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same." DIXON, C. J., construing this clause, in the opinion in State *v.* West Wisconsin R. Co., 34 Wis. 197, observes: "It is as impossible to believe that the framers of the constitution were looking back over the period of three or four hundred years into the middle ages, designing to give this court such jurisdiction, and only such, as was then exercised in virtue of the writ of quo warranto, as it is that they intended to confine the court to that antiquated and useless process. The framers of the constitution were practical men, and were aiming at practical and useful results. They used the words 'writs of quo warranto,' just as they had been used in common parlance, and by courts, lawyers and writers for hundreds of years, as synonymous with 'information in the nature of quo warranto' which had so long been the complete and unqualified substitute for the writ. 'This (the information) is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only.' 3 Black. Com. 263. By the statute of this state the fine may be something more than nominal. R. S. ch. 160, sec. 15, 2 Tay. Stats. 1812, § 21. And in the early and leading case in New York, The People *v.* Utica Insurance Co., decided in 1818, and reported in 15 Johns. 358, in which the remedy by information was applied to one of

§ 611. In Florida, also, the terms quo warranto and information in the nature thereof are used as * 441 synonymous, and the constitutional provision conferring original jurisdiction upon the court of last resort of the state, by the writ of quo warranto, is held to warrant that court in exercising jurisdiction by information in the nature of a quo warranto.[1] It is also held, that it is not necessary to the exercise of the jurisdiction thus con- * 442 ferred, that the legislature should prescribe any par-

these modern private moneyed or commercial corporations, we find Justice SPENCER using the following language: 'An information in the nature of a quo warranto is a substitute for that ancient writ which has fallen into disuse, and the information which has superseded the old writ is defined to be a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, and seize it for the crown. It has, for a long time, been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only.' Now it was with a view to this well-known jurisdiction, then and long before exercised only in the proceeding by information, that the framers of the constitution gave or reserved the power to this court, using for convenience and brevity merely the words 'writ of quo warranto,' just as those words were used by Chancellor KENT in Attorney General *v.* Utica Ins. Co. 2 Johns. Chy. 371, 376, and as they had been used by other courts and writers times without number, and as they are still even used in our own statute (R. S. ch. 160, sec. 1, 2 Tay. Stats. 1807, § 1,) as meaning the same thing and intended to convey the same general idea of the words, 'information in the nature of quo warranto.' "

[1] State *v.* Gleason, 12 Fla. 190. By section 5, article VI, of the constitution of Florida, it is provided that the supreme court of the state shall "have power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." Mr. Justice WESTCOTT, pronouncing the opinion in State *v.* Gleason, says: "Does the proceeding here, to wit: an information in the nature of a quo warranto, come within the constitutional grant of power to issue a writ of quo warranto? It will be found by reference to the American cases, that the constitutional grant of power in other states, where the proceeding has been by information, is precisely similar to the grant here. An examination will show that in the American practice the terms 'quo warranto' and 'information' in the nature of quo warranto, are used as synonymous and convertible terms, the object and end of each being substantially

ticular mode of procedure, and that, in the absence of any such established mode, the court will proceed in conformity with the common-law usages governing proceedings upon quo-warranto informations.[1] And under the constitution of Colorado, which confers upon the supreme court of the state jurisdiction over "writs of quo warranto," the term writ of quo warranto is regarded as synonymous with the information in the nature of a quo warranto, and as including that proceeding.[2]

§ 612. In Missouri, the earlier doctrine seems to have been somewhat analogous to that prevailing in Wisconsin and Florida, and it was held that the supreme court of the state derived jurisdiction by quo-warranto information, from a constitutional provision conferring upon the court the power of issuing writs of quo warranto, and other original remedial writs.[3] The later decisions in that state, however, recognize a distinction in the use of the terms, and hold that the writ of quo warranto, authorized by the constitution as an original remedial writ, to be issued by the supreme court, is the original common-law writ as anciently used in England, and that it may issue without leave of court, being in the nature of a writ of right. It is therefore issued as of course, upon demand of the proper officer of the state, just as * 443 a summons issues from an inferior court when the

the same. Speaking of an information of this character, where the constitutional grant of power was the same as in our constitution, the supreme court of Missouri say: 'This court conceives that jurisdiction is given of this case by the power to issue writs of quo warranto.' State v. Merry, 3 Mo. 278; 8 Mo. 331. In Wisconsin, the supreme court hold to the same view, remarking that the information has in view the same object. 1 Wis. 333. This, upon examination, will be found to be the American doctrine, and in England such a thing as a distinct proceeding by the ancient writ of quo warranto has not been practiced for centuries."

[1] State v. Gleason, 12 Fla. 190.

[2] People v. Keeling, 4 Col. 129.

[3] State v. Merry, 3 Mo. 278.

state begins an ordinary civil action against a citizen, and the court is without discretion in granting the writ.[1]

§ 613. The same distinction was formerly recognized in Arkansas, where it was held that the ancient writ of quo warranto, and the information in the nature thereof,

[1] State *v.* St. Louis Insurance Co. 8 Mo. 330; State *v.* Stone, 25 Mo. 555. See, as to the jurisdiction of the supreme court of Missouri over informations in the nature of quo warranto, State *v.* Vail, 58 Mo. 97. In State *v.* St. Louis Insurance Co. 8 Mo. 330, Mr. Justice SCOTT, for the court, says: "This court, by the constitution of the state, has power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs, and to hear and determine the same. It would seem that the general assembly confounded the proceedings on a writ of quo warranto with those on an information in the nature of a quo warranto, by making it the duty of the attorney general to apply to this court for a writ of quo warranto. A writ of quo warranto is in the nature of a writ of right for the state against any person who claims or exercises any office, to inquire by what authority he supports his claim, in order to determine the right. (3 Black. Com. 262.) The writ of quo warranto, in consequence of the length of its process, has long since become obsolete in the English law, and information in the nature of a quo warranto, wherein the process is speedier, has been substituted in its place. Tomlin's Law Dic., title, 'Quo Warranto.' The general assembly must have contemplated this last proceeding in directing the attorney general to apply to this court for a writ of quo warranto. A writ of quo warranto, as we have seen, is in the nature of a writ of right. It issues on demand of the proper officer of the state, as a matter of course, and there is no more necessity for an application to this court for this writ than there would be for a summons in a circuit court when the state is about to commence an action of debt against one of her debtors. No reasons are offered why the writ should issue; no information is communicated by affidavit, or otherwise, and there is no power in this court to refuse issuing the writ. Where, then, is the necessity of asking leave? The asking leave is the admission that this court has a discretion in refusing or granting a writ of quo warranto, whereas none is considered to exist. In the case of the State *v.* Merry, 3 Mo. Rep., it was held that under that clause in the constitution which gave this court original jurisdiction of writs of quo warranto, an information in the nature of a quo warranto might be filed, and that jurisdiction of it would be entertained. In the case of the State *v.* McBride, 4 Mo. Rep. 303, an information in the nature of a quo warranto was exhibited against him, and jurisdiction was entertained of it by this court. The question was not made in that case;

* 444 are so distinct in their nature, and in the procedure under them, that, under a constitutional provision, conferring upon the supreme court of the state the power to hear and determine writs of quo warranto, as an original jurisdiction, the court was limited to the old common-law writ, and could not exercise jurisdiction by a quo-warranto information.[1] When, therefore, it was desired to
* 445 institute proceedings in that state against a private corporation, such as a banking association, to procure

the party, it is presumed, acquiescing in the opinion pronounced in the case of the State *v.* Merry. No question of jurisdiction can arise on the application now made by the attorney general, as he has not thought proper to ask leave to file an information in the nature of a quo warranto, but a demand is made simply for the writ itself, which, we conceive, issues as a matter of course, from the clerk's office of this court, on demand of the proper officer."

[1] State *v.* Ashley, 1 Ark. 279; S. C. Ib. 513. See also State *v.* Real Estate Bank, 5 Ark. 595; State *v.* Johnson, 26 Ark. 281. In State *v.* Ashley, the court, RINGO, C. J., say, p. 305: "Informations as the basis or institution of a criminal prosecution, are said to have existed coeval with the common law itself, but as a mode of investigating and determining civil rights between private parties, they seem to owe their origin and existence to the statute of 9th Anne, which expressly authorized the proceeding in all cases of intrusion into, or usurpation of corporate offices in corporate places. And although informations in the nature of a quo warranto were exhibited by the king's attorney general long prior to that time, the remedy given thereby was never extended beyond the limits prescribed to the old writ, and could, therefore, only be granted for some usurpation on the prerogative rights of the crown, and it is said there is no precedent of such information having been filed or allowed at the instance, or on the relation of any private person previous to such statute of 9th Anne, nor could they be so exhibited afterwards, except in the cases mentioned in the statute, which neither increased or abridged the authority of the attorney general on that subject. This proceeding by information, when originally introduced, like all other criminal informations of that period, was designed principally to punish offenders who were guilty of usurping the prerogative rights of the crown; yet, upon conviction or disclaimer, the right of the crown being thereby established, there was, besides the fine, a judgment of ouster against the defendant, or that the franchise be seized into the king's hands, thus affording, incidentally, a civil remedy for the king. And hence it is that all the authorities, ancient and modern, speak of the proceeding as being

a forfeiture of its franchises for mis-user or non-user, the appropriate remedy was held to be by the ancient writ of quo warranto instead of the information.[1] But it is now held in Arkansas, that the constitutional provision giving the supreme court jurisdiction to issue the writ of quo warranto includes the information as well as the common-law writ.[2] And under such a constitutional provision, it is held that a trial by jury can not be demanded upon a writ of quo warranto.[3] Nor is the right to a jury trial in such case conferred by the 14th amendment to the constitution of the United States.[4] So in Missouri, it is held that a jury trial can not be demanded as a matter of right in the trial of an

properly a criminal method of prosecution. It is, however, said to have been long since applied to the mere purpose of trying the mere civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only. And, therefore, it was urged in the argument that it must be considered as a substitute for the ancient writ of quo warranto, which came into existence upon its disuse, and in 1607, fully occupied its place in the common law, and consequently that the convention must be understood as referring to it, when they use the term writs of quo warranto, rather than the antiquated and obsolete proceeding by writ of quo warranto, which it can not be supposed to have been their intention to revise. To this argument we do not assent. The introduction of the latter did not subvert or destroy the former; they may have had, and we do not doubt that they did have a contemporaneous existence; their primary objects were essentially different, and the mode of proceeding in them materially varied, while they were in some respects attended with different results, and the form of the judgment was never the same; one was strictly a civil, the other properly a criminal method of proceeding. We are, therefore, of the opinion that the proceeding by writ of quo warranto and information in the nature of a quo warranto as known to and regarded by the common law, are so different from each other that they can not with propriety be classed together, or comprehended by one common name or description." See this case, p. 513, for the form of the writ of quo warranto, as used in Arkansas, and the procedure thereunder. And compare the form of the writ, as used in this case, with the form of the ancient writ of quo warranto as recited in the statute of Gloucester, Appendix, D, *post*.

[1] State *v.* Real Estate Bank, 5 Ark. 596.

[2] State *v.* Leatherman, 38 Ark. 81.

[3] State *v.* Johnson, 26 Ark. 281. But see State *v.* Allen, 5 Kan. 213.

[4] State *v* Johnson, 26 Ark. 281.

information in the nature of a quo warranto.[1] And in Alabama, when all the facts are admitted it is held that there is no error in refusing a jury trial, since in such case it only remains for the court to pronounce judgment upon those facts[2]

§ 614. In Pennsylvania, most of the substantial features of the ancient writ of quo warranto are preserved by statute, as a remedy for the usurpation of public offices, filled by appointment of the executive, or by election of the people, and the statutory remedy thus afforded, is held by the courts of that state to be, in all save form, the same as the writ of quo warranto at common law.[3] The granting of the writ, however, is regarded as no more a matter of right in that state than is the information under the statute of Anne, but rests in the sound discretion of the court.[4] In Tennessee, * 446 neither the original writ nor the information in the nature thereof, has ever been adopted, the remedy provided by statute in that state, for the usurpation of an office or franchise, being in chancery.[5] In New York, both the ancient writ of quo warranto and proceedings by information in the nature of a quo warranto are abolished by the code of procedure. But the relief which was formerly had by those remedies may now be obtained by a civil action, the form only of the proceeding being abolished, and the jurisdiction and power of the courts remaining unchanged.[6]

§ 615. In cases where the jurisdiction is conferred by the organic law of a state, it can not be taken away by legislative enactment, or by statutory changes in the form of the remedy. And where the supreme court of a state is vested by the con-

[1] State v. Lupton, 64 Mo. 415.

[2] Lee v. State, 49 Ala. 43. As to the right to trial by jury in New York, see People v. Albany & S. R. Co. 57 N. Y. 161.

[3] Commonwealth v. Burrell, 7 Pa. St. 34. See also Murphy v. Farmers' Bank, 20 Pa. St. 415.

[4] Commonwealth v. Jones, 12 Pa. St. 365; Commonwealth v. McCarter, 98 Pa. St. 607.

[5] State v. Turk, Mart.& Yerg. 286; Attorney General v. Leaf, 9 Humph. 755.

[6] People v. Hall, 80 N. Y. 117.

stitution with original jurisdiction in quo warranto, it will continue to exercise the jurisdiction thus conferred, notwithstanding an act of the state legislature attempting to abolish both the original writ of quo warranto and the proceeding by information.[1] In such cases, the grant of power by the organic law of the state is regarded, not so much as conferring the power to issue a writ of a prescribed form, as to enable the court to hear and determine controversies of a certain character. And the jurisdiction thus conferred can not be taken away by legislative enactment or change in the form of remedy, although new process may be adopted calculated to attain the same end.[2] So when jurisdiction in quo warranto is conferred upon the courts by the constitution of the state, the creation by the legislature of another remedy

[1] State *v.* Allen, 5 Kan. 213; State *v.* Messmore, 14 Wis. 115; People *v.* Boughton, 5 Col. 487. See also State *v.* Baker, 38 Wis. 71.

[2] State *v.* Messmore, 14 Wis. 115. The court, DIXON, C. J., commenting upon the case of State *v.* Foote, 11 Wis. 14, say: "The complaint in that case, as in this, was styled an 'information,' and the summons here is copied from the one there issued. No objection was taken to the form of the summons, but the complaint was demurred to, principally on the ground that this court had no jurisdiction over the subject of the action. It was insisted that section 3 of article VII of the constitution, only gave this court power to issue the writ of quo warranto at the common law; that the statutes of 1849 abolished the common-law writ and substituted the proceeding by information; that the present statute abrogated both the writ and the information, and declared a civil action to be the only remedy; and as it was a mere civil action, it could not be entertained. We considered that the framers of the constitution looked rather to the substance than the form; that their object was not so much to give us power to issue a writ of a prescribed form, as to enable us to hear and determine controversies of a certain character; and that this jurisdiction could not be taken away by any legislative changes in the forms of the remedy, but that we might adopt any new process which was calculated to attain the same end. This was in accordance with the previous decisions and practice of this court. It had always taken jurisdiction of the proceeding by information in nature of a quo warranto. The demurrer was, therefore, overruled, but without a written opinion."

for contesting elections will not deprive the courts of such jurisdiction.[1]

§ 616. The jurisdiction in this country, as we have * 447 already seen, is regulated to a considerable extent by the constitutions and statutes of the various states, which generally fix the courts which are empowered to administer the remedy, sometimes conferring the power as an original one upon the court of last resort of the state, and sometimes upon the various courts of general jurisdiction throughout the state. And in cases where both the supreme court of the state and the inferior courts of general common-law powers, such as circuit courts, are vested with jurisdiction in quo warranto, the supreme court may properly refuse to exercise its original jurisdiction in the matter, where the inferior courts are vested with ample power in the premises and can afford adequate relief by entertaining the information.[2] But since the granting of the writ of quo warranto is the exercise of an original and not of an appellate jurisdiction, where the supreme court of a state is by the constitution and laws of the state vested with only appellate powers, it can not issue the writ.[3]

§ 617. A striking analogy exists between the remedy by quo-warranto information, and the extraordinary remedies of injunction in equity and mandamus at law, in that neither of these extraordinary remedies is grantable where the party aggrieved can obtain full and adequate relief in the usual course of proceedings at law, or by the ordinary forms of civil action.[4] And where a specific mode is provided by statute for contesting elections and a specific tribunal is created for

[1] Kane *v.* The People, 4 Neb. 509.

[2] State *v.* Stewart, 32 Mo. 379; State *v.* Buskirk, 43 Mo. 111; State *v.* Claggett, 73 Mo. 388; Coon *v.* Attorney General, 42 Mich. 65. As to the jurisdiction of the supreme court of Ohio in quo warranto, see State *v.* Baughman, 38 Ohio St. 455.

[3] *Ex parte* The People, 1 Cal. 85.

[4] People *v.* Hillsdale & Chatham Turnpike Co. 2 Johns. Rep. 190; State *v.* Wadkins, 1 Rich. 42; State *v.* Marlow, 15 Ohio St. 114; State *v.* Shields, 56 Ind. 521. And see State *v.* Taylor, 15 Ohio St. 137.

that purpose, and the method of proceeding therein is fixed by law, resort must be had to the remedy thus provided, and proceedings by information in the nature of a quo warranto will not be entertained.[1] So an information * 448 will not lie against an officer of state militia, where a special tribunal is provided by the militia law of the state which is vested with exclusive jurisdiction of such matters.[2] Nor is the rule, as here stated, limited to cases where the relief may be obtained in the ordinary forms of common-law actions, but it applies also to cases where the grievance may be redressed by bill in equity, and the existence of an adequate remedy in equity would seem to be a sufficient objection to entertaining proceedings by information.[3]

§ 618. Since the remedy by quo warranto, or information in the nature thereof, is only employed to test the actual right to an office or franchise, it follows that it can afford no relief for official misconduct and can not be employed to test the legality of the official action of public or corporate officers.[4] Thus, in the case of breaches of trust alleged to have been committed by trustees of an incorporated association, relief should properly be sought in equity and not by proceedings in quo warranto.[5] So where a public officer threatens to exercise powers not conferred upon him by law, or to exercise the functions of his office beyond its territorial limits, the proper remedy would seem to be by injunction, rather than by a quo warranto information. Thus, an information will not lie to prevent the legally constituted authorities of a city from levying and collecting taxes beyond the city limits, under an act of legislature extending the limits, and the constitutionality of such an act can not be determined upon a quo-warranto

[1] State *v.* Marlow, 15 Ohio St. 114. See also State *v.* Taylor, 15 Ohio St. 137; Commonwealth *v.* Henszey, 81½ Pa. St. 101; People *v.* Every, 38 Mich. 405.

[2] State *v.* Wadkins, 1 Rich. 42.

[3] People *v.* Whitcomb, 55 Ill. 172; Dart *v.* Houston, 22 Geo. 506. And see State *v.* Ridgley, 21 Ill. 66; Stultz *v.* The State, 65 Ind. 492.

[4] People *v.* Whitcomb, 55 Ill. 172; Dart *v.* Houston, 22 Geo. 506.

[5] Dart *v.* Houston, 22 Geo. 506.

information.[1] Nor will an information lie against the officers of a municipal corporation to determine whether certain territory has been properly annexed to the municipality.[2]

§ 619. Where, however, the right to an office or * 449 franchise is the sole point in controversy, the specific legal remedy afforded by proceedings in quo warranto is held to oust all equitable jurisdiction of the case.[3] Thus, the legality of the election of trustees of an incorporated association, and their consequent right to exercise the functions pertaining to their office, and to conduct the affairs of the corporation, will not be determined by bill in chancery, such a case being regarded as appropriately falling within the

[1] People v. Whitcomb, 55 Ill. 172. Mr. Justice WALKER, for the court, says: "The question sought to be raised by the information in this case is, whether the city officers can extend the city government beyond the original limits of the town, and can levy taxes and enforce ordinances in the portion of territory annexed by the act of February 23, 1869, and which is used exclusively for agricultural purposes, and whether that act is not unconstitutional and void. The demurrer to the answer of respondents brought the whole record, as well the information as the answer, before the court to determine its sufficiency. The first question presented by the demurrer is, whether the remedy, if any exists, has not been misconceived; whether the question of power to extend the city government over this territory thus annexed can be raised by quo warranto. This writ is generally employed to try the right a person claims to an office, and not to test the legality of his acts. If an officer threatens to exercise power not conferred upon the office, or to exercise the powers of his office, in a territory or jurisdiction within which he is not authorized to act, persons feeling themselves aggrieved may usually restrain the act by injunction. * * * In this case, there seems to be no question that defendants in error are legally and properly officers of the city, and there can be as little doubt that they may perform all the functions of their offices within the city limits, whatever they may be. If they attempt to pass and enforce ordinances beyond the bounds of the city, or to levy and collect taxes beyond the city limits, such acts would be unauthorized, and might, no doubt, be restrained on a bill properly framed for that purpose. But whether a law which purports to attach this territory to the original corporate limits is or not constitutional, can not be determined in such a proceeding as this."

[2] Stultz v. The State, 65 Ind. 492.

[3] Updegraff v. Crans, 47 Pa. St. 103; Hullman v. Honcomp, 5 Ohio St. 237.

jurisdiction of the common-law courts by proceedings in quo warranto.[1] And since this remedy is applicable the moment an office or franchise is usurped, an injunction will not lie to prevent the usurpation, even though the respondent has not yet entered upon the office or assumed to exercise its functions. In such case, the party aggrieved should wait until an actual usurpation has occurred and then seek his remedy in quo warranto.[2]

§ 620. To warrant a court in entertaining an information in the nature of a quo warranto, a case * 450 must be presented in which the public, in theory at least, have some interest, and it is not an appropriate remedy against persons alleged to have assumed a trust of a merely private nature, unconnected with the public interests. Thus, trustees appointed under an act of legislature to close up the affairs of a state bank, are not regarded as officers whose title can be determined by this form of remedy, since the public, as such, have no interest in the matter, and more appropriate relief may be sought by bill in equity on behalf of the parties aggrieved. Such trusteeship has none of the elements of an office, having neither a prescribed tenure and functions, nor an official oath. Nor is it a franchise in any proper sense of that term, since the appointment confers no privilege or immunity of a public nature, nor does it convey any element of prerogative from the sovereign to the subject. Hence, an information will not lie in cases of this nature, but the parties aggrieved will be left to pursue their remedy in equity for a mal-administration of the trust.[3] The information,

[1] Hullman *v.* Honcomp, 5 Ohio St. 237.

[2] Updegraff *v.* Crans, 47 Pa. St. 103.

[3] People *v.* Ridgley, 21 Ill. 66. "The act under which the defendants were appointed," says Mr. Justice BREESE, "does not declare the trust to be an office, nor in the manner of their appointment was it considered an office. It has none of the indications of an office, no tenure is prescribed, no fees or emoluments allowed, and no salary, nor is any oath required to be taken. As the relators define it in their information, it is a mere 'trusteeship,' the duties of it being

* 451 however, will lie against one who claims an exclusive franchise or privilege of a valuable nature, affecting the public, such for example as the privilege of operating a ferry over a river, although the mere fact of taking money from passengers is not of itself conclusive evidence of setting up or asserting an exclusive right.[1]

§ 621. The information in the nature of a quo warranto being in effect a civil remedy, although criminal in form, it is held that a statute of limitations barring proceedings upon the prosecution of indictments or informations under any penal law, is not applicable to this form of remedy, and it is not barred by such a statute.[2] And in the absence of any

to take charge of the assets and wind up the affairs of the state bank, pay out its specie on hand *pro rata*, and issue certificates of indebtedness to bill-holders and other creditors; in one word, to administer on the effects of a defunct corporation. These were duties of a special character, applicable alone to a particular corporation, and nothing more. It has none of the constituents of an office, none whatever. The defendants have the legal title to all the property assigned, to hold to them and the survivors of them, so that by judgment of ouster they could not be divested of this title. This can only be done by bill in chancery. Is it a franchise? A franchise is said to be a right reserved to the people by the constitution, as the elective franchise. Again, it is said to be a privilege conferred by grant from government, and vested in one or more individuals as a public office. Corporations or bodies politic are the most usual franchises known to our laws. In England, they are very numerous, and are defined to be royal privileges in the hands of a subject. An information will lie in many cases growing out of these grants, especially where corporations are concerned, as by the statute of 9 Anne, ch. 20, and in which the public have an interest. In 1 Strange R. (The King *v.* Sir William Louther,) it was held that an information of this kind did not lie in the case of private rights, where no franchise of the crown has been invaded. If this is so, if in England a privilege existing in a subject, which the king alone could grant, constitutes it a franchise, in this country, under our institutions, a privilege or immunity of a public nature, which could not be exercised without a legislative grant, would also be a franchise. There must be some parting of prerogative belonging to a king, or to the people, under our system, that can constitute a franchise. Upon these defendants nothing of that kind was conferred."

[1] Rex *v.* Reynell, Stra. 1161.

[2] Commonwealth *v.* Birchett, 2 Va. Cas. 51.

statutory period of limitation, it is held in this country that the attorney general may file the information in behalf of the people at any time, and that lapse of time constitutes no bar to the proceeding, in conformity with the maxim *nullum tempus occurrit regi.*[1]

§ 622. Where the remedy by information in the nature of a quo warranto has been regulated by legislative enactments, these enactments are regarded by the courts as in the nature of remedial statutes, to which a strict construction is not to be applied. In such cases the usual rules of construction of remedial statutes are held applicable, and the courts will so construe them as to promote and render effective the remedy sought.[2]

[1] State *v.* Pawtuxet Turnpike Co. 8 R. I. 521.

[2] Commonwealth *v.* Dillon, 61 Pa. St. 488.

CHAPTER XIV.

OF QUO WARRANTO AGAINST PUBLIC OFFICERS.

§ 623. Information generally used in England against municipal corporations; in this country against public officers.
624. Power derived from the people in the United States; when people estopped from questioning title.
625. Office defined; jurisdiction extended to all public officers; extended to creation of new office.
626. Nature of offices for which the information will lie; three tests applied.
627. Actual user of office must be shown.
628. Judicial discretion; information refused for petty office.
629. Burden of showing title rests on respondent.
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630. Degree of interest required of relator.
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634. The information lies against governor of a state; presumptions indulged.
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636. Jurisdiction not exercised to restrain officer from acting.
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638. Return of canvassers not conclusive as to election; effect of ballots.
639. The doctrine recognized in New York; the rule in Michigan.
639 *a*. Certificate of election not conclusive.
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640. In Alabama, information only lies for ineligibility to office.
641. Remedy in quo warranto a bar to an injunction.
642. Rule where rights of claimant are being already adjudicated.
643. Misdemeanor in office; change of residence of officer.
644. Information will not lie where judgment of ouster can not be rendered.
645. The jurisdiction not exercised where mandamus is the appropriate remedy.

646. Effect of acquiescence in irregular election.
646 *a*. Control of legislature or city council over elections, when a bar to quo warranto.

§ 623. The information in the nature of a quo warranto, as used in England, has been generally * 452 employed as a corrective of the usurpation of municipal offices and franchises, and the reports of that country afford more frequent instances of its application to municipal affairs than for any other purpose. * 453 In this country, however, the jurisdiction has been most frequently exercised for the purpose of determining disputed questions of title to public office, and for deciding upon the proper person entitled to hold the office and exercise its functions. And in the United States the remedy is now universally applied for this purpose, and the principles governing the exercise of the jurisdiction in this class of cases are, for the most part, clearly and definitely fixed by an established course of judicial decisions.

§ 624. Since, under the American system, all power emanates from the people, who constitute the sovereignty, the right to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, is regarded as inherent in the people in the right of their sovereignty. And the title to office being derived from the will of the people, through the agency of the ballot, they are necessarily vested with a right of enforcing their expressed will, by excluding usurpers from public offices. Nor is this right in any manner impaired by statutes, granting to electors, in their private capacity as citizens, the right to contest the election of any person assuming to exercise the functions of an office. Such statutes may have the effect of sharing the right with the elector, but they do not take away the right from the people in their sovereign capacity.[1] Where, how-

[1] People *v.* Holden, 28 Cal. 123. Say the court, SANDERSON, C. J.: "It is first claimed by the appellant that the district court had no jurisdiction in the premises, and that the only remedy in cases like the

ever, the people have, by their proper agents, the legislature of the state, ratified by legislative enactment an election to a public office and have recognized the title of the person elected thereto, they can not afterwards question the title by proceedings in quo warrranto.[1]

§ 625. An office, such as to properly come within
* 454 the legitimate scope of a quo-warranto information,
may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public.[2] And in the exer-

present is under the statute which prescribes the mode and manner of contesting elections. Wood's Digest, p. 380, sec. 51. No proposition could be more untenable. It is true that the act providing the mode of contesting elections confers upon any elector of the proper county, the right to contest, at his option, the election of any person who has been declared duly elected to a public office, to be exercised in and for such county. But this grant of power to the elector can in no way impair the right of the people, in their sovereign capacity, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, and to remove him therefrom if it be made to appear that he is a usurper having no legal title thereto. The two remedies are distinct, the one belonging to the elector in his individual capacity as a power granted, and the other to the people in the right of their sovereignty. Title to office comes from the will of the people as expressed through the ballot box, and they have a prerogative right to enforce their will when it has been so expressed, by excluding usurpers and putting in power such as have been chosen by themselves. To that end they have authorized an action to be brought in the name of the attorney general, either upon his own suggestion or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state. It matters not upon what number of individual persons a right analogous in its results when exercised may have been bestowed, for the power in question none the less remains in the people in their sovereign capacity. It has been shared with the elector, but not parted with altogether. Substantially the same point was made in the case of The People *v.* Jones, 20 Cal. 50, without success."

[1] People *v.* Flanagan, 66 N. Y. 237.

[2] See United States *v.* Lockwood, 1 Pinney's Wis. 659; Commonwealth *v.* Swasey, 133 Mass. 538.

cise of the jurisdiction under discussion it will be found to extend to and cover a great variety of offices of a public nature, both elective and appointive, and whose functions partake of an executive, ministerial, legislative, or judicial character. Nor is the use of the information limited to cases of the usurpation of an existing office or franchise, but it may be extended also to the setting up of a new office without authority of law.[1] But an information will not lie to test the title to an office which is not a legally authorized public office.[2]

§ 626. It seems to have been the earlier doctrine in England, that a quo-warranto information would not lie for any office, unless there had been a direct usurpation upon the crown, and doubts were at one time entertained as to whether the jurisdiction could be exercised for any office not derived immediately from the crown, by charter or express grant. The rule, however, is now well established by the highest judicial tribunal in that country, that the information in the nature of a quo warranto will lie for usurping any office, whether created by charter alone, or by act of parliament, provided it is an office of a substantive, public nature, and not merely the function or employment of an agent * 455 or servant, terminable at the will of others. Thus, the functions of a city treasurer, entrusted with the custody of the public funds, are of such a nature as to render the office subject to proceedings upon a quo-warranto information, although it is created, not by charter from the crown, but by act of parliament, and although the incumbent is appointed by certain magistrates, though not removable at their pleasure.[3] And the three tests to be applied in determining

[1] Rex v. Boyles, Stra. 836.

[2] State v. North, 42 Conn. 79. As to the remedy by quo warranto in the case of an appointive office in Iowa, see State v. Minton, 49 Iowa, 591. As to the effect in proceedings in quo warranto of a failure to qualify for an appointive office to fill an unexpired vacancy, see State v. Conn, 14 Kan. 217.

[3] Darley v. The Queen, 12 Cl. & Fin. 520, the leading English case. This was a writ of error in the house of lords, on a judgment in

whether an information will lie, are: first, the source
* 456 of the office; second, its tenure; and third, its duties.

The source of the office should be from the crown or sovereign authority, either by charter or legislative enactment, its tenure should be fixed and permanent, and its duties should be of a public nature. Applying these tests the information will lie for the office of guardian of the poor,

the exchequer chamber in Ireland, affirming a judgment of the queens bench there, in the case of an information in the nature of a quo warranto against the incumbent of the office of treasurer of the county of the city of Dublin. The principal question in the case was, whether the information would lie for such an office, it being created by parliament and not by charter from the crown. Lord Chief Justice TINDAL, for the judges, after an exhaustive review of the authorities, says: "After the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone, or by the crown, with the consent of parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others, for, with respect to such an employment, the court certainly will not interfere, and the information will not properly lie. The case of the registrar of the Bedford Level, the King *v.* Corporation of Bedford Level, 6 East, 356, and that of a county treasurer, who is the mere servant of the justices in England, the King *v.* Justices of Herefordshire, 1 Chit. 700, are instances of this latter sort. There are then only two questions in respect to this office: Was it public? and was the treasurer a mere servant of the Dublin magistrates? The functions of the treasurer were clearly of a public nature; he was to applot the assessment, receive and hold the money for a time, keep it subject to his order on the bank, pay the expense of public prosecutions, and pay other public moneys. It is clearly, therefore, of a public nature, and it is equally clear that though appointed by the magistrates, he is not removable at their pleasure, and must, we think, be treated not as their servant, but as an independent officer. If the crown had established this office with precisely the same functions, the person filling it being removable in the same way as an officer of a corporation created by charter, there could be no doubt that an information would lie, and the circumstance that the crown has enacted that there should be such an office, with the consent of the two other branches of the legislature, has been shown to make no difference. We think for these reasons that the nature of the office held by the plaintiff in error was such for which an information in the nature

which is of a public character, created by statute, and entrusted with the performance of public duties.[1] And, applying the same standard, it will be refused for an office in a private association of a purely eleemosynary character, where the office or position partakes neither of a public nor of a quasi-public nature.[2]

§ 627. To lay the foundation for granting an information in the nature of a quo warranto to test the right or title to an office, there must in all cases have been an actual possession and user of the franchise. It is not sufficient, therefore, that the person against whom the jurisdic- * 457 tion is invoked should have merely claimed the right to take the official oath, but an absolute user must also be

of a quo warranto may be sustained, and that the judgment thereon is not erroneous." The lord chancellor observes as follows: "My lords, I entirely agree in the opinion which has been expressed on the part of the learned judges. Adverting to the provisions of the act of parliament, I am clearly of opinion that the office of treasurer of the county of the city of Dublin is a public office, the officer having important public duties to discharge; and that the office is also of an independent character. It is clear, therefore, that if this office had been created by charter, an information in the nature of a quo warranto would have lain for its usurpation. But the matter of doubt and controversy has been, whether, when an office is created, not by charter, but by act of parliament, an information of this kind can be sustained. There is a conflict of authority upon this subject. For my own part, I have long since come to the conclusion that, in this respect, there is no difference between the circumstance of an office being created by charter and being created by act of parliament. In both cases the assent of the sovereign is necessary. Whether this is given by charter, or whether it is given by assent to an act of parliament passed by both branches of the legislature, I think is altogether immaterial."

[1] Regina *v.* Hampton, 13 L. T. R. N. S. 431. And see Queen *v.* Guardians of the Poor, 17 Ad. & E. N. S. 149.

[2] *Ex parte* Smith, 8 L. T. R. N. S. 458, following Darley *v.* The Queen, 12 Cl. & Fin. 520. In Florida, it is held that while a pilot is not an officer in such sense that an information will lie against him in that capacity, yet because he exercises certain valuable privileges and franchises under the laws of the state, an information may be maintained. State *v.* Jones, 16 Fla. 306.

shown.[1] But where an officer is acting without having been sworn into his office, he is guilty of an usurpation, even though he may have been duly elected.[2] And the taking the oath of office within the time fixed by law is a sufficient acceptance and user, even though the person has not actually discharged the duties of the office.[3] So when an actual user is shown, the respondent having entered into the office, taken the official oath, and performed its duties for a time, and still claiming to be entitled to the office, an information will lie, even though he neglects and refuses longer to perform the duties pertaining to the office.[4]

§ 628. It is important to observe that the granting leave to file informations in the nature of a quo warranto, is not in all cases a matter of strict right, but is subject, in a considerable degree, to the exercise of a wise judicial discrimination, applied to the circumstances of the particular case. While, therefore, the sovereign authority has the unquestioned right to call any person to account for exercising, without authority, the functions of any office of a public nature, however small, yet the courts are averse to allowing the information to be filed in the case of petty offices of little importance.[5] And in applications for the exercise of the jurisdiction, it is proper for the court to take into consideration the fact that no one complains of being deprived of the office which is exercised by respondent, as well as the fact that the matter involved is of no practical importance, and that the term of office is short and has partially expired when the application is made.[6]

[1] King *v.* Whitwell, 5 T. R. 85. "No instance has been produced," says Mr. Justice BULLER, "in which the court have granted an information in the nature of quo warranto, where the party against whom it was applied for has not been in the actual possession of the office. No such instance can have happened, and all the cases cited are the other way."

[2] *In re* Mayor of Penryn, Stra. 582.

[3] People *v.* Callaghan, 83 Ill. 128.

[4] State *v.* Graham, 13 Kan. 136.

[5] Anon. 1 Barn. K. B. 279.

[6] State *v.* Fisher, 28 Vt. 714. See also People *v.* Sweeting, 2 Johns. Rep. 184.

§ 629. An important feature of the law governing quo warranto informations, and one which most distinguishes this remedy from ordinary civil actions at law, is that the prosecutor is not obliged to show title in himself to sustain the action, or to put the respondent upon the necessity of proving his title. And the principle is well established that the burden rests upon the respondent of showing a good title to the office whose functions he claims to exercise, the state being only obliged to answer the particular claim of title asserted.[1] The principle has been carried even * 458 further, and it has been held that it is incumbent upon the respondent to show, not only his title, but also the continued existence of every qualification necessary to the enjoyment of the office, and that it is not sufficient for him to state the qualifications necessary to the appointment, and rely on the presumption of their continuance.[2] And while it is true, that as to officers *de facto* the courts will not inquire into their title in collateral proceedings, yet in proceedings in the nature of a quo warranto, the object being to test the actual right to the office and not merely a use under color of right, it is incumbent upon the respondent to show a good legal title, and not merely a colorable one, since he must rely wholly on the strength of his own title. If he fails in this requirement judgment of ouster will be given.[3]

§ 629 *a*. In proceedings in quo warranto to determine the title to a public office the primary question for determination is, whether the respondent is legally entitled to the office in

[1] State *v.* Gleason, 12 Fla. 265; People *v.* Mayworm, 5 Mich. 146; Rex *v.* Leigh, Burr. 2143; People *v.* Thacher, 55 N. Y. 525. And see People *v.* Miles, 2 Mich. 348; Clark *v.* The People, 15 Ill. 217; State *v.* Beecher, 15 Ohio, 723. But see People *v.* Lacoste, 37 N. Y. 192.

[2] People *v.* Mayworm, 5 Mich. 146.

[3] People *v.* Bartlett, 6 Wend. 422; People *v.* Pease, 30 Barb. 588. But in State *v.* Hunton, 28 Vt. 594, it is held that where the respondent is in possession of the office, the presumption of law is in favor of the regularity of his election, and the relator being bound to make out his case has the affirmative of the issue.

question, and not as to the rights of other claimants to the office. If the information is based upon the relation of one claiming title to the office his rights may be incidentally determined, but not when the proceeding is instituted by the state.[1] And want of title in the relators to the office in question is not a sufficient objection to the proceedings, when the information shows a good cause of action in behalf of the state.[2] But the failure of the respondent to prove his title does not of itself establish the title of a relator claiming the office, and he must himself prove his own title affirmatively.[3]

§ 630. As regards the degree of interest in the office or franchise in controversy, which must be shown to render one a competent relator to institute the proceedings, it has been held that a member of a board of public officers has a sufficient interest in the subject-matter to make him a competent relator, in an information to test the title of another member of the same board.[4] But where the relator seeks by information not only to oust the respondent, but also to establish his own right to the office, he must show both his interest in and title to the office, as well as the necessary qualifications to render him eligible thereto.[5]

§ 631. Long acquiescence on the part of the relators or informers, and their motives in seeking to file the information, as well as the probable consequences to result from the * 459 proceedings, are all proper subjects for consideration by the court in determining whether to grant or with-

[1] State v. Townsley, 56 Mo. 107. It is also held in this case, that the court will not inquire into the qualifications of electors, in a proceeding in quo warranto, when another means is provided by law for such investigation. To the same point, see State v. Vail, 53 Mo. 97.

[2] Lake v. State of Florida, 18 Fla. 501.

[3] People v. Thacher, 55 N. Y. 525. In Virginia, it is held that one who commits an act which disqualifies him from holding an office, such as fighting a duel, may be removed by a proceeding in quo warranto, and that such disqualification need not be first determined by a criminal conviction. Royall v. Thomas, 28 Grat. 130.

[4] Dickson v. The People, 17 Ill. 197.

[5] State v. Boal, 46 Mo. 528.

hold leave to file the information.[1] And the principle is well settled that where one has concurred in inducing a person to exercise the functions of an office, he is estopped from afterward seeking by information to oust him from the office.[2] And one who has acquiesced in certain irregularities in the manner of conducting an election to an office, will not be allowed, after himself submitting to the chances of an election and being defeated, to make such irregularities the ground of assailing the title of the officer elected by a quo-warranto information.[3] So the relator's laches in making the application, is an important element to be considered by the court in determining whether leave shall be granted to file the information.[4] But, while the courts are disposed to overlook trifling irregularities in the election of officers who have held long and undisturbed possession of their franchise, length of time will not prevail as against the sovereign, where the irregularities in the election go to the very question of right, and in such cases the maxim *mullum tempus occurrit regi* applies with especial force.[5] So when the proceeding is instituted by the attorney general in behalf of the state, the fact that the relator has acquiesced in the exercise by respondents of the franchise in question will not operate as an estoppel.[6]

§ 632. In determining the propriety of a quo-warranto information, as a corrective of the usurpation of an office or franchise, an important distinction is to be drawn between the case of a public office proper, affecting public rights and interests, and that of a mere employment or agency, having no certain tenure, but determinable at the will of the

[1] King *v.* Dawes, 1 Black. W. 634.

[2] Queen *v.* Greene, 2 Ad. & E. N. S. 460.

[3] Regina *v.* Lockhouse, 14 L. T. R. N. S. 359.

[4] Queen *v.* Anderson, 2 Ad. & E. N. S. 740.

[5] King *v.* Woodman, 1 Barn. K. B. 101.

[6] State *v.* Sharp, 27 Minn. 38. See as to the effect of long acquiescence by the people in the claim of respondent to exercise the functions of an office, in proceedings in quo warranto, State *v.* Seay, 64 Mo. 89.

employer. And while, in a generic sense, it is true that every office is an employment, yet the converse of the proposition by no means follows, and there are many employments, even of a public nature, which are not offices. While, therefore, the jurisdiction under discussion is well established as regards the usurpation of offices of a public nature, it is never * 460 exercised in the case of a mere agency or employment, determinable at the pleasure of the employer.[1] Thus, it is held that an information will not lie to remove officers of a railway company incorporated in the state, who hold their office by virtue of an election of the directors, such officers being merely agents or servants of the company, and removable at the pleasure of the directors. And the doctrine holds good even under a statute extending the remedy to offices in corporations created by the state, since the question of what constitutes an officer is not affected by such a statute, and must be determined by the common law.[2] So where persons are employed by the governor of a state to perform certain duties for the state, there being no certainty as to their tenure of place, and they being subject to removal at pleasure, no office exists in the legal acceptation of the term, and an information will not lie. The usurpation in such case, if any, is a usurpation upon the governor of the state, and not upon the state itself. Nor does the recognition of such employment by the legislature of the state, and the making of annual appropriations for its support, without changing its original character, or the tenure by which it is held, render the employment an office the title to which may be the subject of an information.[3]

§ 633. Although, under the English practice, leave to file an information is frequently given, notwithstanding the term of office for which the respondent was elected has already expired, the object of the information in such case being to inflict a fine for the usurpation, yet in this country, where the

[1] People v. Hills, 1 Lansing, 202; State v. Champlin, 2 Bailey, 220.

[2] People v. Hills, 1 Lansing, 202.

[3] State v. Champlin, 2 Bailey, 220.

imposing of a fine has not generally been adopted, a different rule prevails. And where the term of office has expired by lapse of time, and the officer no longer exercises or claims the franchise, so that judgment of amotion or ouster can not be rendered against him, the proceedings will not usually be entertained, and the courts will refuse leave to file the information.[1] And since the courts are vested with a certain degree of judicial discretion in granting or * 461 refusing applications for leave to file the information, leave will not be granted when it appears that the term of office for which the respondent was elected will expire before the cause can be brought to trial, since the filing of the information in such case would be useless, and could not restore the relator to the office.[2] But the fact that after the rule to show cause has issued, the respondent resigns his office, and his resignation is accepted, presents no bar to making the rule for the information absolute, since the resignation is no answer to the rule, although it may regulate the discretion of the court of kings bench in determining the fine.[3] And in this country, in those states where the imposition of a fine and the payment of costs are fixed by statutes of the state against one who is found guilty of usurping an office, the information will not be dismissed because of the expiration of the term of office after it was filed, but it will still be retained for the purpose of inflicting the fine and costs.[4] So where the incumbent of the office has ceased to exercise its functions the court may still decide upon his right, without, however, proceeding to judgment of ouster.[5] And while it is conceded that where the officer has already resigned his

[1] Morris *v.* Underwood, 19 Geo. 559; State *v.* Jacobs, 17 Ohio, 143. And see State *v.* Taylor, 12 Ohio St. 130; People *v.* Sweeting, 2 Johns. Rep. 184.

[2] People *v.* Sweeting, 2 Johns. Rep. 184; Commonwealth *v.* Reigart, 14 S. & R. 216; State *v.* Schnierle, 5 Rich. 299. And see State *v.* Fisher, 28 Vt. 714.

[3] King *v.* Warlow, 2 Mau. & Sel. 75.

[4] People *v.* Hartwell, 12 Mich. 508; State *v.* Pierce, 35 Wis. 93. See *contra*, State *v.* Porter. 58 Iowa, 19

[5] State *v.* Taylor, 12 Ohio St. 139

office, a quo-warranto information is not necessary and will not lie merely for the purpose of vacating the office, yet where the object of the proceeding is not only to cause the respondent to vacate the office, but also to establish the title of the relator thereto, a different principle prevails. In such case the information will lie, even though the respondent has resigned and his resignation has been accepted before the rule was obtained, since the relator is entitled either to try * 462 the validity of respondent's title, or to have his avowal upon the record of the invalidity of his election.[1]

§ 634. The office of governor of a state is regarded as a civil office of such a nature as to be amenable to the exercise of the jurisdiction under discussion. And where, by the constitution and laws of a state, its highest judicial tribunal is vested with jurisdiction by information in the nature of a quo warranto to prevent the citizens of the state from usurping its offices and franchises, an unlawful intrusion into the chief executive office of the state may be tried by this proceeding to judgment of ouster. In such case a plain distinction is recognized between a department of the government and the person assuming to exercise its duties, and the judicial branch of the government in no manner interferes with or attempts to control the legitimate functions of the executive department, but only seeks to protect the people from an unlawful usurpation of a high public office or franchise.[2] Where, how-

[1] Queen *v.* Blizard, L. R. 2 Q. B. 55, 15 L. T. R. N. S. 242.

[2] Attorney General *v.* Barstow, 4 Wis. 567. Mr. Justice COLE, for the court, says, p. 750: "The objection to the exercise of the jurisdiction of this court to entertain a proceeding to determine the right of a person to hold and enjoy the office of governor, is, that it is dangerous to the independence of the executive department of the government. The executive power of the state is vested in the governor by the constitution, and hence, it is said, you can not interfere with the person acting as governor without disturbing the department. Who does not see the fallacy of this reasoning and the utter confusion of ideas in the very statement of the proposition? It assumes, in the first place, the very point in controversy, to wit: the right of the person acting as governor, to the office. This inquiry proceeds upon the hypothesis

ever, under the constitution of a state, the determination of the election of governor is vested exclusively in the state legislature, an information in quo warranto will not lie to

that this right is disputed, contested; that the respondent is an usurper. But whether he is or not is a question of fact to be established by proof alone. It is certainly very illogical to commence reasoning upon a proposition by begging the question. The question here is, who is entitled to hold the office of governor of this state? The answer given is that the respondent is the governor, and there the argument ends. Concede it, and there is nothing to inquire into; no right to be ascertained, no subject for judicial investigation. But whether the respondent is the governor or not, is the issue. But a still greater error in the reasoning upon this case consists in confounding the person who holds an office with the office itself. By the general theory and principle of our government, the legislative, executive and judicial departments are equal, co-ordinate and independent, each within the sphere of its powers. Admit it, and what follows? It is said that the person holding the office of governor is the executive department, or to state the proposition more intelligibly, the department and person are one and indivisible. Here is the vice of most of the reasoning upon this subject. Gentlemen will not discriminate, or do not discriminate between the office and the officer, a department of the government and a person exercising and acting in that department. Yet, to my mind, there is no difficulty whatever in making a distinction. I can easily see how an intruder may be removed from a department without interfering with or disturbing or impairing one jot or tittle of the powers of such department. Were it not for the conceded ability of the gentlemen who have advanced this argument, vitiated by this palpable fallacy involved in it, I should not deem it worthy a moment's examination. As it is, it must be treated with sufficient respect to explode, if possible, the absurdity. And I therefore say that there is not, and from the nature of the case there can not be, any resemblance, any similitude, any necessary connection, much less identity, between a department of the government and the person exercising the duties of the department. A department is a division or classification of a certain kind, of the powers of the government. It is not necessary to define what a person is, only negatively, and say that a person is not a department. Consider that the agents, the officers of these departments have been successively changing since the adoption of the constitution. Yet the departments remained unchanged. Some have died, perhaps, and others removed from the state; but the departments whose duties they discharged, are still unimpaired. So that this court can sit, examine and decide upon the rights of contestants to the office of governor, and give judgment against one, and for another, without breaking down or disturbing the executive department of the government."

determine the title to the office.[1] And it is to be
* 463 observed that where the proceedings upon an information to determine the right to hold and exercise a public office, call in question the acts of the executive department of the state, and are, in fact, based upon a supposed violation of the constitution by that department, the presumption will be indulged by the judiciary that the executive department has acted rightly until the contrary is shown.

Indeed, this presumption may be said to exist in favor
* 464 of the regularity of the acts of inferior executive officers, and it applies with equal, if not greater force, to the heads of executive departments, such as the governor of a state.[2]

§ 635. The jurisdiction under consideration extends to judicial as well as political offices, and the office of probate judge of a county is one for which an information will lie.[3] But it has been held in Alabama, that the supreme court of the state has no power to inquire into the constitutionality of the appointment of a judicial officer, made by the legislative department of the state. And where the legislature had established a new inferior court, and had at the same session elected one of its own members to be the judge of such court, the supreme court of the state refused to interfere with the matter by information, or to inquire into the constitutional power of the legislature to make the election.[4]

§ 636. Notwithstanding the jurisdiction under discussion is, as we have seen, well established to correct the usurpation of an office or franchise of a public nature, the courts will not

And Mr. Justice SMITH observes, p. 769: "So long as the constitution has prescribed certain qualifications for the executive office, and the people have hedged it about with inhibitory safeguards, I unhesitatingly affirm that if the writ of quo warranto could reach an intruder into no other office, that writ, or some other adequate process, should reach the office of governor."

[1] State v. Baxter, 28 Ark. 129.

[2] Commonwealth v. Frazier, 4 Mon. 513.

[3] United States v. Lockwood, 1 Pinney's Wis. 359.

[4] State v. Paul, 5 Stew. & Port. 40.

permit its use for the purpose of preventing a public officer from exercising any right or privilege incident to his office, and it can not be used to restrain an officer from doing a particular act, the right to perform which is claimed as a part of his official functions. Thus, where a special judge is duly appointed and commissioned to try certain particular causes, quo warranto will not lie to test his authority to try certain of these causes, being a part of those which he was commissioned to hear and determine.[1] And where the controversy is not as to the right to an office, but as to which of two officers is authorized to perform a particular duty, such as the assessment and collection of certain taxes, proceedings in quo warranto will not lie.[2] So in a proceeding in the nature of a quo warranto to determine the title to public offices, since the public interest requires that the duties of such offices should be performed pending the litigation, the officers *de facto*, who are made respondents to the action, should not be enjoined from exercising their functions pending the controversy.[3]

§ 637. The use of the quo-warranto information as a remedy for the usurpation of public offices, is not confined to offices of a civil nature only, but extends to military offices created by and existing under the laws of a state.[4] Thus, where an officer of the state militia holds his office by virtue of an election by the legislature of the state, receives his commission under the seal of the state, and takes the same oath before entering upon his office that is required of * 465 all other public officers, his position is regarded as an office of a public nature, the title to which may be appropriately determined by an information in the nature of a quo warranto.[5] Where, however, a special tribunal or court of inquiry is created under the militia laws of the state, having exclusive jurisdiction over officers in the state militia, an

[1] State *v.* Evans, 3 Ark. 585.
[2] State *v.* Smith, 55 Tex. 447.
[3] State *v.* Durkee, 12 Kan. 363.
[4] State *v.* Brown, 5 R. I. 1; Commonwealth *v.* Small, 26 Pa. St. 31.
[5] State *v.* Brown, 5 R. I. 1.

information will not be entertained for such offices, since this extraordinary remedy is never granted to the exclusion of special remedies provided by law, and which are adequate to afford redress.[1]

§ 638. It is now the well-established doctrine, that in proceedings upon information to test the title to a public office, the return or certificate of canvassing officers as to the result of the election, is not conclusive as to the result or the title to the office. Such officers are, in general, held to be only ministerial officers, vested with no judicial functions whatever, and their return is, at the most, but *prima facie* evidence in favor of the incumbent of the office. The courts will therefore go behind such return, and will investigate the facts of the election, the number of votes cast, and the legality of the action of the canvassers. For this purpose they may receive testimony and make all needful investigation to determine the questions in dispute, and if satisfied that the proceedings of the canvassers are erroneous, judgment of ouster will be given.[2] If, however, the certificate of election is

[1] State *v.* Wadkins, 1 Rich. 42.

[2] People *v.* Van Slyck, 4 Cow. 297; State *v.* Steers, 44 Mo. 223; Attorney General *v.* Barstow, 4 Wis. 567; People *v.* Thacher, 55 N. Y. 525. See also People *v.* Pease, 30 Barb. 588; People *v.* Cook, 8 N. Y. 67. And see Cooley on Constitutional Limitations, 623, *et seq.*, where the whole subject of contesting elections is exhaustively treated. The language of the court, WOODWORTH, J., in People *v.* Van Slyck, 4 Cow. 297, very clearly states the rule as follows: "This is an information in nature of a quo warranto, filed against the defendant, who, as is alleged, intruded into and unlawfully holds the office of sheriff of the county of Schenectady. The remedy by information is adapted to this case. The statute is comprehensive in its terms. It extends to all persons who shall usurp, intrude into, or unlawfully hold and execute any office or franchise within this state. The jurisdiction of the court can not well be doubted when the question relates to a public office. The decision of officers acting ministerially is sought to be reviewed. In the People *v.* The Mayor of New York, 3 John. Cas. 79, and the Same *v.* Sweeting, 2 John. Rep. 184, the court entertained jurisdiction, in one case where the relator claimed to have been elected to the office of alderman, in the other to that of supervisor, and considered an information as the proper remedy to try the right of the parties. It was contended on the

regular in form, signed by the proper officers and issued upon a legal canvass of the votes cast, it will be regarded as *prima facie* evidence of title to the office.[1] But as between the actual ballots cast at the election, and the canvass of those ballots by the canvassing officers, the ballots constitute the primary and controlling evidence of the election.[2] So the fact that the incumbent *de facto* of an office holds a commission therefor, is not conclusive as to his right, * 466 since the title is derived from the election and not from the commission. Regarding the commission, therefore, as affording only *prima facie* evidence of title, the courts may go behind it and may investigate the facts concerning the election. And if, upon such investigation, it appears that the respondent holds his office without having been duly elected, he may be ousted, notwithstanding his commission.[3]

§ 639. The doctrine as above stated is still applied in the state of New York, although the writ of quo warranto and the information in the nature thereof have been abolished by the code of procedure, the remedy before obtained in these forms being now had by a civil action instituted for that purpose. For the purposes of such action, it is held that the return of canvassing officers affords only *prima facie* evidence of an election, and the court may and will go behind the certificate of the canvassers and investigate the facts of the election

argument, that the decision of the board of canvassers was conclusive until reversed, and could only be reviewed by certiorari. This objection can not prevail. The duties of the canvassers are ministerial. They are required by the act to attend at the clerk's office and calculate and ascertain the whole number of votes given at any election, and certify the same to be a true canvass. This is not a judicial act, but merely ministerial. They have no power to controvert the votes of the electors. If they deviate from the directions of the statute, and certify in favor of a sheriff not duly elected, he is liable to be ousted by information. The trial is had upon the right of the party holding the office. The certificate is not conclusive. The court will decide upon an examination of all the facts."

[1] State *v.* Buckland, 23 Kan. 259.

[2] Hudson *v.* Solomon, 19 Kan. 177.

[3] State *v.* Steers, 44 Mo. 223; State *v.* Vail, 53 Mo. 97, affirmed in State *v.* Townsley, 56 Mo. 107; Hardin *v.* Colquitt, 63 Ga. 588.

itself.[1] And upon principle as well as authority, it would seem that such proceedings properly open up an inquiry into every fact tending to show which of the claimants of an office was the actual choice of the electors.[2] In Michigan, however, where the constitution of the state provides that when the return of the state board of canvassers is contested, the legislature in joint convention shall decide as to the person elected, it would seem that the courts can not go behind such return.[3]

§ 639 *a*. In proceedings in quo warranto to determine the right to an elective office, the real issue is as to who has received the necessary votes to entitle him to the office. And while the certificate of the proper officers upon this point may be received in the first instance in lieu of direct evidence showing that a plurality of votes were cast for the incumbent, yet when it is shown that such certificate is incorrect, the presumption in favor of the incumbent is overcome, and he must show by other evidence that he received the requisite number of votes.[4]

§ 639 *b*. When the object of the proceeding is to establish the title of relator to the office in question, if the return shows that he was removed from office by a board of municipal officers, on account of misconduct, the only questions to be considered are as to the jurisdiction of such board, and whether they have made a proper order upon a final adjudication of the case, and as to the sufficiency of the record evidence of their action. And in such a case, all reasonable presumptions will be entertained as to the regularity and validity of the action of such board.[5]

§ 640. In Alabama, a somewhat novel doctrine is * 467 maintained, with regard to the use of a quo-warranto information as a means of testing the title to an office, and ousting an incumbent unlawfully exercising its fran-

[1] People *v.* Cook, 8 N. Y. 67.
[2] People *v.* Pease, 30 Barb. 588.
[3] See People *v.* Goodwin, 22 Mich. 496.
[4] State *v.* Norton, 46 Wis. 332.
[5] State *v.* Prince, 45 Wis. 610.

chises, and the propriety of the remedy in that state would seem to be dependent upon the ineligibility of the officer, or his illegal election in the first instance. And while the information will lie against one who was originally ineligible, or who was never duly and legally elected, and whose tenure of office was therefore illegal from the first, yet if the incumbent was lawfully elected in the first instance, and was eligible to the office, he can not be ousted by information, but resort must be had to the means afforded by the laws of the state for the punishment of officers by impeachment or otherwise.[1] This doctrine, however, is unsupported by the authorities and is plainly repugnant to the principles which govern the exercise of the jurisdiction in quo warranto.

§ 641. In accordance with the general principle denying equitable relief where full redress may be had at law, the specific legal remedy afforded by proceedings in quo warranto to test the right to an office, is held to oust all equitable jurisdiction of the case, and since this remedy is applicable the moment the office or authority is usurped, an injunction will not lie to restrain the exercise of official functions, even though there has been no actual entry upon the office. In such case, the party aggrieved should wait until an actual attempt is made to exercise the functions pertaining to the office, and then pursue his legal remedy by quo warranto.[2]

§ 642. While the jurisdiction by quo-warranto information to correct the unlawful usurpation of an office, is too well established to admit of controversy, and while judgment of ouster will be given in such proceedings against one who is found to be exercising the functions of an office, without due authority, yet where the rights of another claimant to the office are already being adjudicated, in the mode prescribed by statute for contesting elections, his rights will not be determined upon proceedings in quo warranto, but will be

[1] State v. Gardner, 43 Ala. 234.
[2] Updegraff v. Crans, 47 Pa. St. 103.

left to the final adjudication of the contest already pending for that purpose.[1]

§ 643. Where the relation or petition admits that * 468 the officer against whom the proceedings are instituted was duly elected and qualified, it should show, in order to sustain the application, some act of the officer working a forfeiture *ipso facto* of his office, and a mere misdemeanor will not suffice for this purpose, where the law has provided a particular method for the punishment of misdemeanors in office. And the fact that an officer, such as the sheriff of a county, after being duly elected and installed into his office, has been made a non-resident in the county, by an act of legislature changing the boundary lines of the county, does not work a forfeiture of the office, and is not sufficient to sustain a writ of quo warranto.[2]

§ 644. Ordinarily it would seem to be a sufficient objection to the exercise of the jurisdiction against a public officer, that the case as presented is one in which the court can not give judgment of ouster, even should the relator succeed. Thus, an information will not be allowed against certain magistrates, to compel them to show by what authority they grant licenses within a jurisdiction alleged to pertain to other magistrates, since there can not in such case be judgment of ouster or of seizure into the hands of the crown.[3]

§ 645. Proceedings in quo warranto will not be entertained where the writ of mandamus affords the appropriate and fitting remedy. For example, where one is elected to a county office, as that of sheriff, and commissioners whose duty it is to accept and approve his bond refuse so to do, the appropriate remedy is by mandamus to compel the commissioners to perform their duty, and not by proceedings in the nature of a quo warranto against the incumbent of the office.[4] So an information will not lie against one chosen

[1] State *v.* Taylor, 15 Ohio St. 137.
[2] State *v.* Hixon, 27 Ark. 398.
[3] Regina *v.* Justices of Durham, 2 L. T. R. N. S. 372.
[4] State *v.* Lewis, 10 Ohio St. 128.

as a member of a common council, for refusing to take upon himself the duties of the office to which he has been elected, the remedy, if any, being by mandamus.[1]

§ 646. The fact that an irregularity in the election to a public office, which is made the foundation for a * 469 quo-warranto information, has been shared by the relator, who acquiesced therein without objection at the time of the election, is sufficient to estop him from maintaining the information. Thus, where the information seeks to overthrow the title to an elective office, upon the ground that the election was void, having been held at a place other than that designated in the notices required by law, but it is shown by counter affidavits that the relator participated in the election, and was himself an opposition candidate, with full knowledge of the irregularity in the place of holding the election, the rule will be discharged, since the courts will not permit the public welfare to be disturbed by declaring an election void, in behalf of one who has participated in the irregularity.[2]

[1] Queen *v.* Hungerford, 11 Mod. Rep. 142.

[2] People *v.* Waite, 70 Ill. 25, 6 Chicago Legal News, 175. The doctrine of estoppel in such cases is clearly stated by Mr. Justice SCOTT, as follows: "Relator claims he was in a legal manner elected school trustee for township thirty-eight, and that respondent has usurped that office, and now holds it and is exercising its functions without authority of law. The affidavit shows respondent was himself elected to that office by the qualified voters of the town. It is insisted, however, the election was void, for the reason it was not held at the place designated in the notices required by law to be posted prior to holding the election. The counter affidavits show relator participated in the election he now seeks to have declared void, by voting thereat, and was himself an opposition candidate to respondent. Relator knew then as well as now what irregularities had intervened in the conduct of the election, and he ought not to be permitted to disturb the public welfare by having an election declared void in which he participated with a full knowledge of all irregularities that existed. A sound public policy forbids it. The only informality charged is, the election was held at an improper place. This fact was known to relator. He uttered no complaint at the time, but submitted his claims to the office to the voters of the town voting at that

§ 646 *a*. When, under the constitution of a state, the power to determine the elections, returns and qualifications of members of the legislature is vested exclusively in each house as to its own members, the courts are powerless to entertain jurisdiction in quo warranto to determine the title of a member of the legislature. In such case, the constitution having expressly lodged the power of determining such question in another body, the courts can not assume jurisdiction in quo warranto, but will leave the question to the tribunal fixed by the constitution.[1] So when a board of aldermen of a city are vested with judicial powers in determining the elections and qualifications of their own members, and have passed upon and rejected the application of a claimant for admission to the office of alderman, such adjudication is conclusive against the applicant until reversed, and is a bar to an action brought by him in the courts to establish his title, although it constitutes no bar as against the people.[2]

place, and claimed the right to, and did have his own vote recorded. These facts make it inequitable that he should have the remedy sought, and the court, in the exercise of a sound legal discretion, properly discharged the rule. The judgment must therefore be affirmed."

[1] State *v.* Tomlinson, 20 Kan. 692

[2] People *v.* Hall, 80 N. Y. 117.

CHAPTER XV.

OF QUO WARRANTO AGAINST PRIVATE CORPORATIONS.

§ 647. Quo-warranto information the remedy for mis-user, non-user, or usurpation of corporate franchise.
648. Corporate franchise defined; rights of sovereign power; ground of forfeiture.
649. Courts averse to forfeiture of franchise; not allowed where other remedy exists.
650. Information lies for usurping corporate franchise; insurance company doing banking business.
651. Non-performance of conditions of charter a ground of forfeiture; principles of construction.
652. Degree of title necessary; distinction between cases of private and public right.
653. Offices in private corporations.
654. Courts averse to forfeiture of franchise on complaint of private citizen.
655. Actual user of corporate office must be shown.
656. Effect of statute; user required.
657. Presumption in favor of long user.
658. Acquiescence of corporator a bar to relief; discretion in case of private prosecutor.
659. Acquiescence, conduct and motives of relators to be considered.
660. Dissolution of corporation not cognizable in equity; effect of state being stockholder.
661. Instituting proceedings in corporate name, when an admission of corporate existence.
662. When corporate existence a jurisdictional fact.
662 *a*. Filing information against corporation not an admission of its legal existence.
663. When respondents presumed to be members of corporation.
664. Trustees of church; when civil courts concluded by decision of ecclesiastical tribunals.
665. Information does not lie against minister in church.
666. What constitutes forfeiture of franchise.
667. Non-user must be total; banking corporation.
667 *a*. When burden of proof rests upon the state.

668. Information not allowed for mere mistake, no usurpation being shown.
669. Effect of information upon action at law against corporation.
670. Charter can not be attacked through title of officer; information not granted against mere servant.
671. Intendment in favor of regularity of proceedings of directors.
672. Effect of clause in charter as to time of dissolution.
673. Resignation of officers no bar to information.
674. Effect of votes offered for corporate officers, but not received.
675. Title to defunct office not tried by proceedings against successor.
676. Disclaimer and plea of not guilty; evidence allowed.
677. Election of trustees not determined in chancery.
677 *a*. When information allowed against railway company.

§ 647. The use of the original writ of quo war-
* 471 ranto to correct the usurpation of corporate franchises may be traced to a very remote origin, so remote, indeed, as to be shrouded in uncertainty, and to afford a fruitless topic of antiquarian speculation. It has already been shown, that in the reign of Edward I. the use of the writ was regulated by statute, which would indicate that it was then a well-established remedy. Gradually, however, this ancient remedy fell into disuse, owing doubtless to the tedious nature of the process, and to the fact that the judgment rendered in the proceeding was conclusive, even against the crown, and in modern times its place has been almost entirely superseded by the information in the nature of a quo warranto. And the latter remedy has now come to be regarded in England and in most of the states of this country, as the appropriate means of testing the right to exercise corporate franchises, as well in private as municipal corporations, and as the proper corrective for a mis-user, non-user, or abuse of such franchises.[1] Indeed, this branch of the jurisdiction may be said to be of equal importance with that exercised over public officers, and the information is freely employed for the purposes indicated. In Arkansas, however, the ancient writ of quo warranto is regarded as the proper

[1] See Reed v. C. & O. Canal Corporation, 65 Me. 132.

remedy to seize into the hands of the state the franchise of a corporation on the ground of mis-user or non-user.[1]

§ 648. A corporate franchise is a species of incorporeal hereditament, in the nature of a special privilege or immunity, proceeding from the sovereign power and subsisting in the hands of a body politic, owing its origin either to express grant, or to prescription which presupposes a grant.[2] It follows, therefore, that the sovereign power * 472 has the right at all times to inquire into the method of user of such franchise, or the title by which it is held, and to declare a forfeiture for misuser or non-user, if sufficient cause appears, or to render judgment of ouster if the parties assuming to exercise the franchise have no title thereto. And it may be stated as a general rule, that whenever there has been a mis-user or non-user of corporate franchises, which are of the very essence of the contract between the sovereign power and the corporation, and the acts complained of have been repeated and willful, they constitute just ground for a forfeiture in proceedings upon an information.[3] The ques-

[1] State *v.* Real Estate Bank, 5 Ark. 595.

[2] See People *v.* Utica Insurance Co. 15 Johns. Rep. 358.

[3] Commonwealth *v.* Commercial Bank, 28 Pa. St. 383. And see People *v.* Kingston & Middletown Turnpike, 23 Wend. 193. Commonwealth *v.* The Commercial Bank, was a writ of quo warranto, issued out of the supreme court of the state, upon the relation of the attorney general, to procure a forfeiture of the respondent's franchises, on the ground of its having dealt in promissory notes, contrary to an express provision of its charter, and having loaned money at higher rates than those prescribed by the charter. The extent of mis-user necessary to work a forfeiture is very clearly stated in the opinion of the court by LEWIS, C. J., as follows: "These acts are expressly prohibited in the fundamental articles. The question then arises, do these constant and willful violations of the fundamental conditions upon which the charter was granted, entitle the commonwealth to demand its forfeiture? The question is not whether a single act, or even a series of acts of mis-user, through inadvertence or mistake, may work a forfeiture, but whether the constant and willful violation of these important conditions of the grant produce that effect? Mr. Justice STORY, in delivering the judgment of the Supreme Court of the United States in Mumma *v.* Potomac Company, held, that 'a corporation, by

tion, however, to be determined in such cases, is not
* 473 whether a single act or a series of acts of mis-user,
through inadvertence or mistake, may work a forfeiture, but whether the constant and willful violation of the conditions of the corporate grant produces this result.[1]

§ 649. It is to be observed in the outset, that the courts proceed with extreme caution in proceedings which have for their object the forfeiture of corporate franchises, and such forfeitures are not to be allowed, except under express limitation, or for a plain abuse of power by which the corporation fails to fulfill the design and purpose of its organization.[2] Especially are the courts inclined to look with disfavor upon such forfeitures when the law has provided other sufficient remedies; and when an adequate legal remedy is provided in damages, the corporate franchise will not be forfeited until an

the very terms and nature of its political existence, is subject to dissolution by forfeiture of its franchises for willful mis-user, or non-user.' 8 Peters Rep. 287. Many years before that decision was pronounced, the same principle was fully recognized by the same high authority in Truett *et al.* *v.* Taylor *et al.*, 9 Cranch, 43, where the right of forfeiture for mis-user or non-user was held to be 'the common law of the land, and a tacit condition annexed to the creation of every corporation.' It is now well settled by numerous authorities, that it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter, as for condition broken, or for a breach of trust. See Angell & Ames on Corporations, § 776, and the cases there cited. In the Attorney General *v.* Petersburg and Roanoke Railroad Company, 6 Iredell, 461, it was held that the omission of an express duty prescribed by charter is a cause of forfeiture, and that as implied powers are as much protected by law as those which are expressed, implied duties are equally obligatory with duties expressed, and their breach is visited by the same consequences. 6 Iredell. 461. It may be affirmed as a general principle, that where there has been a mis-user, or a non-user, in regard to matters which are of the essence of the contract between the corporation and the state, and the acts or omissions complained of have been repeated and willful, they constitute a just ground of forfeiture."

[1] Commonwealth *v.* Commercial Bank, 28 Pa. St. 383.

[2] State *v.* The Commercial Bank, 10 Ohio, 535; State *v.* Farmer's College, 32 Ohio St. 487; Harris *v.* M. V. & S. I. R. Co. 51 Miss. 602.

entire derangement of the corporate affairs is shown.[1] Nor will the courts interfere by this extraordinary remedy against corporate bodies, when ample relief may be had in the ordinary course of proceedings at law. Thus, the information will not lie against a turnpike company, which is charged with having opened its road through the relator's land without agreeing with him as to the compensation, and without having the damages ascertained in the manner provided by law, since in such case the corporation is a mere trespasser, and ample relief may be had by an ordinary action at law.[2] So leave has been refused to file an information based upon the violation of an agreement imposing certain conditions upon which the corporation obtained valuable privileges from a city, the state having no interest in redressing such grievances.[3] And upon proceedings in quo warranto the court will not consider the question whether the corporators intend in good faith to carry out the objects of their incorporation.[4]

§ 650. When a corporation is attempting, without authority of law, to exercise a franchise to which it is * 474 not entitled under its charter, and which under the laws of the state can only be exercised under a legislative grant, an information is the proper remedy to determine its authority, and if the title set up in defense is incomplete, the people are entitled to judgment of ouster. Thus, when under the laws of a state the right of carrying on banking operations is a franchise, which can only be used by virtue of a legislative grant, the information lies against an insurance company which is carrying on a banking business without authority of law, and judgment of ouster will be given in such case.[5]

[1] State *v.* The Commercial Bank, 10 Ohio, 535.

[2] People *v.* Hillsdale & Chatham Turnpike Co. 2 Johns. Rep. 190.

[3] People *v.* Mutual Gas Light Co. 38 Mich. 154.

[4] State *v.* Beck, 81 Ind. 500.

[5] People *v.* Utica Insurance Co. 15 Johns. Rep. 358. This was an information in the nature of a quo warranto, filed by the attorney general against the respondent for having exercised banking privileges without authority from the legis-

§ 651. The non-performance of the conditions of
* 475 the act of incorporation is deemed, *per se*, a mis-user sufficient to forfeit the grant on proceedings by infor-

lature. SPENCER, J., observes, p. 387: "If there are certain immunities and privileges in which the public have an interest, as contradistinguished from private rights, and which can not be exercised without authority derived from the sovereign power, it would seem to me that such immunities and privileges must be franchises; and the act for rendering the proceedings upon writs of mandamus, and informations in the nature of quo warranto, more speedy and effectual, presupposes that there are franchises, other than offices, which may be usurped and intruded into. If, in England, a privilege in the hands of a subject, which the king alone can grant, would be a franchise, with us, a privilege or immunity of a public nature, which can not legally be exercised without legislative grant, would be a franchise. The act commonly called the restraining law, (sess. 27 ch. 114,) 1 R. S. 712, enacts, that no person, unauthorized by law, shall subscribe to, or become a member of, any association, or proprietor of any bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks do, or may transact, by virtue of their respective acts of incorporation. Taking it for granted, at present, for the purpose of considering whether the remedy adopted is appropriate, that the defendants have exercised the right of banking, without authority, and against the provisions of the restraining act, they have usurped a right which the legislature have enacted should only be enjoyed and exercised by authority derived from them. The right of banking, since the restraining act, is a privilege or immunity subsisting in the hands of citizens, by grant of the legislature. The exercise of the right of banking, then, with us, is the assertion of a grant from the legislature to exercise that privilege, and, consequently, it is the usurpation of a franchise, unless it can be shown that the privilege has been granted by the legislature. An information, in the nature of a writ of quo warranto, need not show a title in the people to have the particular franchise exercised, but calls on the intruder to show by what authority he claims it; and if the title set up be incomplete, the people are entitled to judgment. (2 Kyd on Corp. 399; 4 Burr. 2146–7.) This position is illustrated by the nature and form of the information. The title of the king is never set forth; but after stating the franchise usurped, the defendant is called upon to show his warrant for exercising it. This consideration answers the argument urged by the defendant's counsel, that banking was not a royal franchise in England, and that it is not a franchise here which the people, in their political capacity, can enjoy; for if their title to enjoy it need not be set out in the information, it is not necessary that it

mation.[1] And in determining whether such a departure from the provisions of the act of incorporation has been made

should exist in them at all. In the case of The King v. Nicholson and others, (1 Str.) it appeared that by a private act of parliament for enlarging and regulating the port of Whitehaven, several persons were appointed trustees, and a power was given to them to elect others upon vacancies by death or otherwise. The defendants took upon them to act as trustees without such an election, and upon motion for an information in the nature of a quo warranto against them, it was objected, by the counsel for the defendants, that the court never grants these informations but in cases where there is a usurpation upon some franchise of the crown; whereas, in that case, the king alone could not grant such powers as are exercised by the trustees, the consequence of which was, that this authority was no prior franchise of the crown. To this it was answered, and resolved by the court, that the rule was laid down too general, for that informations had been constantly granted when any new jurisdiction or public trust was exercised without authority; and leave to file an information was, accordingly, granted. This case is a strong authority in favor of this proceeding. Many cases might be cited in which informations, in the nature of quo warranto, have been refused, where the right exercised was one of a private nature, to the injury only of some individual. In the present case, the right claimed by the defendants is in the nature of a public trust; they claim, as a corporation, the right of issuing notes, discounting notes, and receiving deposits. The notes they issue, if their claim be well founded, are not obligatory on the individuals who compose the direction, or are proprietors of the stock of the corporation. These notes pass currently, on the ground that the corporation have authority to issue them, and that they are obligatory on all their funds; the right claimed is one, therefore, of a public nature, and, as I conceive, deeply interesting to the community; and if the defendants can not exercise these rights without a grant from the legislature, if they do exercise them as though they had a grant, they are, in my judgment, usurping an authority and privilege of a public kind; and we perceive that it is not necessary that the right assumed should be a prior franchise of the crown, or of the people of the state." As to the remedy by information in the nature of quo warranto to wind up the affairs of a banking corporation in Indiana, and as to the necessary averments of the petition, see Albert v. The State, 65 Ind. 413. As to the use of the information to oust an illegal insurance company of its franchises, see State v. Central Ohio Mutual Relief Association, 29 Ohio St. 399.

[1] People v. Kingston & Middletown Turnpike, 23 Wend. 193; People v. Kankakee River Improvement Co. 103 Ill. 491.

as to work a forfeiture, the same general principles of
* 476 construction are applicable which govern valuable grants to individuals upon conditions subsequent or precedent. In all such cases, a substantial performance of the conditions according to the intent of the charter is all that is required, and slight departures are overlooked.[1] And

[1] People *v.* Kingston & Middletown Turnpike, 23 Wend. 193. And see People *v.* Bristol & Rensselaerville Turnpike, Ib. 222. In People *v.* Kingston & Middletown Turnpike, the court, NELSON, C. J., after referring to the common-law rule that a non-performance of the conditions of the act of incorporation is deemed, *per se*, a mis-user that will forfeit the grant, say: "But granting this to be the general principle, the question still comes up for consideration, what departure from the provisions of the charter will work a forfeiture? Shall every omission or non-performance of a condition of the grant have this effect? Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court. The powers and privileges are conferred and the conditions enjoined upon them; they obtain the grant and engage to perform the conditions; and when charged with a breach, I do not perceive any reason against holding them accountable upon principles applicable to an individual to whom valuable grants have been made upon conditions precedent or subsequent. As to him, performance is indispensable to the vesting or continued enjoyment. If a feoffment be made of lands upon condition of paying rent, building a house, or planting an orchard, and a failure to perform, the feoffer may enter. So, if an office be granted, a condition is implied that the party shall faithfully execute it, and for neglect the grantor may discharge him. 1 Bacon, 629; 15 Wendell, 291; 1 id. 388; 3 id. 498; 13 id. 530. Placing corporate grants upon this footing, there can be no great difficulty in ascertaining the principles that should govern conditions annexed to them. The analogous cases of individual conditional grants will give the rule. In these a reasonable and substantial performance according to the intent of the grantor is required. Shep. Touch. 133; 15 Wendell, 291. In cases of conditions subsequent, if impossible to be performed, or rendered impossible by the act of God, the grantee is excused, and the estate is absolute. 2 Bacon, 676, tit. Condition; Shep. Touch. 133, 157. So, if waste be committed by a stranger, it shall not be a breach of the condition of the lease. 2 Bacon, 652. The whole law on the subject will be found reasonable, and nothing is required but what is within the means and ability of the party to comply with. It is emphatically so with respect to corporators, for we all know the nature of the conditions in their

while, as we have already seen, the courts are inclined to look adversely upon applications for a forfeiture of * 477 the franchise, where other adequate legal remedy may be had, yet the existence of other remedies at law will not necessarily deprive the public of the common-law remedy by information for a mis-user of corporate franchises.[1]

§ 652. As regards the title necessary to be shown by the prosecutor in order to support the information, a distinction is taken between cases affecting merely private rights, where the proceedings are instituted in behalf of a private citizen, and cases affecting public interests, where the people are the real as well as nominal prosecutor. For example, where the object of the information is to remove respondents from certain corporate offices of which they are incumbents, it is necessary that the relators show a title in themselves before they can properly inquire by what authority the respondents exercise their office or franchise, and a failure to show such title is fatal to the application.[2] And it would seem that an information will not be allowed in behalf of one corporator against another, on the ground of a defect of * 478 title which applies equally to the relator or to those

charters depends very much upon themselves; they usually settle the terms of the grant, and therein consult their own as well as the public interests. * * * I have said that the whole law on the subject of performance of conditions precedent or subsequent is reasonable and within the ability of the company to perform. A substantial performance according to the intent of the charter is all that is required. Under the issues presented this will be a question on the trial. If such a performance is shown the defendants will be entitled to the verdict. The law in respect to individual grants on condition will afford familiar principles to guide the court and jury. Slight departures are overlooked. The leaning of the law is against the party claiming the forfeiture; and if the failure is such as can not be disregarded in a court of law upon settled principles, and has arisen from mistake or accident, the legislature will apply the remedy. They, and not the court, possess the dispensing power."

[1] People v. Bristol & Rensselaerville Turnpike, 23 Wend. 222; People v. Hillsdale & Chatham Turnpike, Ib. 254.

[2] Miller v. English, 1 Zab. 317.

under whom he claims, even though he has been for many years in the uninterrupted enjoyment of his franchise.[1] Where, however, the proceedings are instituted solely for the protection of the public against an illegal usurpation of a corporate franchise, the people, through their attorney general, being the prosecutor, the information need not show title in the people to have the particular franchise in question exercised. In such case it rests with the respondent to show title, and if the title relied upon in defense be incomplete the people are entitled to judgment.[2]

§ 653. The propriety of an information in the nature of a quo warranto as a remedy for an unlawful usurpation of an office in a merely private corporation, was formerly involved in some doubt, but the question may now be regarded as settled in this country. This species of remedy being generally employed in England in cases of public or municipal corporations, the English precedents are inapplicable to this particular question, and its solution must be referred to the more general principles underlying the jurisdiction in question. Tested by these principles, an intrusion into an office of a merely private corporation may, in this country, be corrected by information with the same propriety as in cases of public or municipal corporations, since there is in both cases an unfounded claim to the exercise of a corporate franchise, amounting to a usurpation of the privilege granted by the state. Indeed, the intrusion into a corporate office, created for the government and exercise of the franchise, can not, in principle, be distinguished from a usurpation of the franchise itself. And it would seem to be true, generally, that wherever a charter has been granted and the right to exercise an office under that charter is questioned, the court may, in its discretion, permit an information to be filed, as in the case of the office of trustees in a church corporation, or

[1] King v. Cudlipp, 6 T. R. 503; King v. Cowell, 6 Dow. & Ry. 336.

[2] People v. Utica Insurance Co. 15 Johns. Rep. 358.

president and directors of an insurance company.[1] In * 479 England, however, it is held that to warrant a quo-warranto information against a corporate officer, his duties must be, to some extent, of a public nature, and where the

[1] Commonwealth *v.* Arrison, 15 S. & R. 127; Commonwealth *v.* Graham, 64 Pa. St. 339; The People *v.* Tibbets, 4 Cow. 358. In Commonwealth *v.* Arrison, TILGHMAN, C. J., for the court, says: "I find no instance of an information in the nature of a quo warranto in that country, (England,) except in a case of a usurpation of the king's prerogative, or of one of his franchises, or where the public, or at least a considerable number of people were interested. Neither do I find any case in which it has been denied that the court may, in its discretion, grant it, where an office is exercised in a corporation contrary to the charter. In England the number of corporations is very small indeed, compared with the United States of America. Consequently the quantity of that kind of business which may be brought into our courts will be much greater than theirs. But that alone is not a sufficient reason for rejecting it. We are now to decide a general question on the right of the court; not on the expediency of exercising that right, either on the present, or any other case. Now to establish it as a principle that no information can be granted in cases of what the counsel call private corporations, might lead to very serious consequences. Perhaps it may be said that banks, and turnpike, canal, and bridge companies, are of a public nature; but yet they have no concern with the government of the country or the administration of justice. They are no further public than as they have to do with great numbers of people. But if numbers alone is the criterion, it will often be difficult to distinguish public from private corporations. Let us consider churches, for example. In some the congregation is very numerous, in others very small. How is the court to make the line of distinction? If you say that the court has the right in both cases to grant or deny the information, according to its opinion of the expediency, there is no difficulty as to the right. But if it be alleged that there is a right in one case and not the other, the difficulty will be extreme. I strongly incline to the opinion that in all cases where a charter exists, and a question arises concerning the exercise of an office claimed under that charter, the court may, in its discretion, grant leave to file an information. Because, in all such cases, although it can not be strictly said that any prerogative or franchise of the commonwealth has been usurped, yet, what is much the same thing, the privilege granted by the commonwealth has been abused. The party against whom the information is prayed, has no claim but from the grant of the commonwealth, and an unfounded claim is a usurpation, under pretence of a charter, of a right never granted."

case presented is merely that of a master in a private hospital, founded by a private person by law, without public * 480 duties or functions of any kind, an information will not lie.[1] And it is said that no instance can be found of an information having been granted in England by leave of the court against persons for usurping a franchise of a merely private nature, and not connected with public government.[2]

§ 654. Notwithstanding the jurisdiction by information in the nature of a quo warranto, to enforce a forfeiture of a corporate franchise, is well established, the courts are averse to its exercise in behalf of merely private citizens. And when the purpose of the application is to seize into the hands of the state the franchises of a corporation, or to procure its dissolution, the courts will not interfere in behalf of a private citizen having no other interest in the controversy than such as pertains to every other citizen. The abuse of a franchise granted by the state being a public wrong, the proceedings must be instituted by the public prosecutor, or other authorized representative of the state, and in such cases a private citizen is not entitled to the aid of this extraordinary remedy, even though he be a creditor of the corporation.[3] The information in such case is a public prosecution, involving the very existence of the corporation, having for its object the recovery to the state of a forfeited franchise and not

[1] Queen v. Mousley, 8 Ad. & E. N. S. 946.

[2] King v. Ogden, 10 Barn. & Cress. 230. And in Pennsylvania, under a statute authorizing proceedings in quo warranto in cases concerning the exercise "of any office in any corporation created by authority of law," it is held that the jurisdiction is limited to corporate officers strictly, and that it does not embrace servants or employés, such as a professor in an incorporated college. Philips v. Commonwealth, 98 Pa. St. 394.

[3] State v. Paterson & Hamburg Turnpike Co. 1 Zab. 9; Commonwealth v. Farmers Bank, 2 Grant's Cases, 392; Commonwealth v. Allegheny Bridge Co. 20 Pa. St. 185; Murphy v. Farmers Bank, Ib. 415; Commonwealth v. Philadelphia, Germantown & Norristown R. Co. Ib. 518. See also People v. North Chicago R. Co. 88 Ill. 537.

the redress of a private grievance. Such cases, therefore, are clearly distinguishable from those which affect only the administration of corporate functions, and do not go to the life of the corporation itself.[4] An exception, however, is recognized in cases affecting only private or individual * 481 rights and which affect merely the administration of

[4] Murphy v. Farmers Bank, 20 Pa. St. 415. This was a proceeding in quo warranto, in the name of the state, upon the relation or suggestion of a private citizen, averring a mis-user and abuse of the franchise of a banking corporation and seeking a forfeiture of its charter. The court, WOODWARD, J., after stating that the substance of the statute of Anne had been adopted in Pennsylvania as part of the common law of that state, and that the clause of the statute authorizing the information on the relation of "any person or persons desiring to prosecute the same," did not extend the remedy to a private relator in a case of public prerogative, proceed to say: "The usurpation of an office established by the constitution, under color of an executive appointment, and the abuse of a public franchise under color of a legislative grant, are public wrongs and not private injuries, and the remedy by quo warranto, in this court at least, must be on the suggestion of the attorney general, or some authorized agent of the commonwealth. For the authorities I refer myself to those cited in the argument of the respondent's counsel. They establish this as the uniform construction in questions involving the existence of a corporation. In questions involving merely the administration of corporate functions, or duties which touch only individual rights, such as the election of officers, admission of a corporate officer, or member, and the like, the writ may issue at the suit of the attorney general, or of any person or persons desiring to prosecute the same. What is a corporation? A franchise. And Blackstone defines a franchise to be a part of the royal prerogative, existing in the hands of the subject. The sovereignty of every state must be lodged somewhere. Limited by such concessions as popular violence has from time to time wrung from reluctant monarchs, it resides in England, in the crown. In Pennsylvania, it resides in the whole mass of the people, and the three co-ordinate departments of government are the trustees appointed by the people for the exercise of so much of their sovereignty as they have not, by the bill of rights, denied them, nor by the constitution of the United States yielded to the general government. The legislature of Pennsylvania may establish a corporation, that is, grant out a part of the sovereignty of the state, because, being a general trustee for the people, and not forbidden, they are qualified to do so. The general government being a government of derivative powers, congress can not establish a corporation, because the power to do so is not granted. Our legislature can,

the corporate functions, without affecting the existence of the corporation, and in such cases it is held that the courts
* 482 may interfere, on a proper showing, upon the relation of a private citizen.[1]

§ 655. It is to be borne in mind that the question of whether an information will lie in the case of a corporate office, is dependent upon the fact of possession or user of the office or franchise in question, and unless an actual user can be shown, in addition to a claim to the office, the information will not lie.[2] And a claim to the office which has been unsuccessfully asserted, or which may possibly be asserted suc-

because the power is not withheld. A corporation then exists in Pennsylvania by virtue of a constitutional exercise of the sovereign power. Its existence is proof of the public will, which is nothing else than the will of the majority. Can one man so employ any of the departments of government as to tear down the fabric of a majority? Regarding the judiciary as one of the trustees of the sovereignty of the people, by which I mean the whole people, how can its functions be called into exercise against the existence of a public institution, except upon the suggestion of some agent of the whole people? If they may, if individual caprice, passion, prejudice, or interest may use the judicial arm of the government to overthrow what the legislative or executive arm have erected, the sovereignty of the majority is extinguished, and the departments of the government, intended to work in harmony, are brought into fatal conflict. A house divided against itself can not stand, and no more can a state. If quo warranto be given to individuals to dissolve corporations, power will cease to steal from the many to the few, for here will be a transfer of it bodily. With a corrupt judiciary, which the history of other countries teaches us is not an impossible supposition, acting as the instrument of private passions, any institution established by the immediate representatives of the people, and existing by will and consent of the people, and for their convenience and benefit, may be frustrated without appeal or recourse. These are general views which harmonize with the doctrine of the cases. And, therefore, whilst I recognize the right of any relator to have a quo warranto in the supreme court who is desirous to prosecute the same to redress any private grievance that falls within that remedy, I deny the right of any party, except the attorney general, or other officer of the commonwealth, to sue for it to dissolve a corporation."

[1] Murphy v. Farmers Bank, 20 Pa. St. 415.

[2] Queen v. Pepper, 7 Ad. & E. 745. And see People v. Thompson, 16 Wend. 655.

cessfully in the future, can not take the place of or be equivalent to the usurped possession which must be shown as a condition precedent to filing the information.[1] Nor is it sufficient to allege generally that the respondent has accepted the office, without specifying the mode of acceptance, or the particular acts constituting it.[2] If, however, an actual user can be shown, it is not necessary in addition thereto to show an acceptance, it being sufficient that the party against whom the proceedings are instituted has acted in the office, regardless of whether there has been a formal acceptance.[3]

§ 656. Where, under the laws of a state, the information is allowed in cases where "any person shall * 483 usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise," or where "any association or number of persons shall act as a corporation without being legally incorporated," to warrant the proceedings by information something more is required than a mere claim to the exercise of the franchise, and an actual user must also be shown. And where, under such a statute, the information charges respondents with claiming and using the franchise of a body corporate, it is not necessary that they should deny the claim to the franchise, but it is sufficient that they deny the user, since this constitutes the gravamen of the charge.[4]

§ 657. As regards the exercise of corporate franchises dependent not upon legislative grant, but upon prescriptive right and long user, it may be remarked that every presumption of law is exercised in favor of long possession. And when it is shown that the franchise which is assailed has been exercised from a period so remote that its foundation can not be distinctly traced, or its origin definitely assigned,

[1] Queen v. Pepper, 7 Ad. & E. 745.

[2] Queen v. Slatter, 11 Ad. & E. 505.

[3] Queen v. Quayle, 11 Ad. & E. 508.

[4] People v. Thompson, 16 Wend. 655.

the exercise of the franchise will not be presumed to be a usurpation, and the courts will not, by granting the information, originate proceedings for questioning its validity.[1]

§ 658. While the interest of a corporator in a private corporation is generally regarded as sufficient to make him a proper relator, in proceedings for an information against the usurpation of corporate offices, yet he may by his own acquiescence forfeit his right to institute the proceeding, even though the title of respondents to the offices is defective. Thus, where members of a corporation have attended a corporate meeting and participated in its deliberations, voting for officers and acquiescing in the result of the election, although knowing certain votes to be illegal, they will not afterwards be allowed to question the legality of the * 484 election by an information.[2] And the granting and refusing leave to file an information on behalf of a private person, for the usurpation of an office under a private corporation, is regarded as resting within the discretion of the court, and the application in such case should show clearly that the office in question is a corporate office.[3]

§ 659. Long acquiescence on the part of relators in the exercise by respondents of a corporate franchise may be sufficient to bar them from relief by information, and the fact that they show no right in themselves, or in any other persons, which depends upon their invalidating respondent's title is an important element in determining whether leave shall be granted to file the information, and these circumstances combining the application will be denied.[4] And the conduct of the relators, as well as their motives and object, and the consequences to the corporation of granting leave to file the information, are all proper elements to be considered by

[1] Queen v. Archdall, 8 Ad. & E. 281.

[2] State v. Lehre, 7 Rich. 234. And see King v. Stacey, 1 T. R. 1.

[3] Gunton v. Ingle, 4 Cranch C. C. 438.

[4] Rex v. Daws, Burr. 2120. See also King v. Stacey, 1 T. R. 1.

the court in passing upon the application.[1] So the fact that the relator stands in the same situation with the respondent, and that the impeaching of respondent's title must necessarily dissolve the corporation, are proper circumstances to be taken into consideration by the court in refusing the application. But it would seem that the fact of relator's title having been previously attacked by a similar information, which was afterwards abandoned, will have no weight with the court in determining whether the application shall be granted or refused.[2] And the state itself is not estopped from instituting proceedings in quo warranto against a private corporation, upon the ground that it has been recognized as a corporation by a municipality of the state.[3]

§ 660. The dissolution of a corporation and the revocation of its franchises are generally considered matters of legal rather than of equitable cognizance, and unless a court of chancery is especially empowered to divest a corporation of its franchises, the more appropriate remedy for this purpose is by an information in the nature of a quo warranto, wherever there is a body corporate *de facto*, assuming to act in that capacity, but which from some defect is not * 485 authorized to exercise corporate powers.[4] And the fact that the state is interested in the corporation as a stockholder, constitutes no sufficient reason why it should not, in its sovereign capacity, proceed against the corporation by an information to procure a forfeiture of its franchise.[5]

§ 661. Some conflict of authority has existed in this country, as to the effect of instituting proceedings against a corporation, *eo nomine*, as an admission of its corporate existence. But the weight of authority may now be regarded as sustaining the proposition that the effect of filing an informa-

[1] Rex *v.* Daws, Burr. 2120. And see King *v.* Bond, 2 T. R. 767.

[2] King *v.* Bond, 2 T. R. 767.

[3] Attorney General *v.* Hanchett, 42 Mich. 436.

[4] Baker *v.* Administrator of Backus, 32 Ill. 110; Commonwealth *v.* James River Co. 2 Va. Cas. 190.

[5] Commonwealth *v.* James River Co. 2 Va. Cas. 190.

tion against a corporation by its corporate name, to procure a forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchise, is to admit the existence of the corporation. When, therefore, the information is filed against the respondent in its corporate name, and process is issued and served accordingly, and the respondent appears and pleads in the same corporate character, its corporate existence can not afterwards be controverted.[1] Nor is it necessary in such case that respondent, having pleaded its charter, should allege a performance of those acts which were required as conditions precedent to its organization and legal existence.[2] Where, however, the action is instituted against individuals, charging them with usurping the privileges and franchises of a body politic and corporate, it is not a sufficient return by such respondents to show the act of incorporation, and that they own a portion of the capital stock of
* 486 the company, being members thereof, and that as such members in connection with other members they have exercised the franchises in question. In such case the return should also show that the respondents are empowered by the corporation to do the acts complained of, and that their action is binding and obligatory upon the corporation itself, since otherwise it is merely their individual action.[3] If, however, the information is filed against a corporation requiring it to show by what authority it exercises its franchises, it is a sufficient defense, *prima facie*, to set up in the return the charter under which the corporation is warranted in exercising the

[1] State *v.* Cincinnati Gas Light Co. 18 Ohio St. 262; State *v.* Commercial Bank of Manchester, 33 Miss. 474. But see, *contra*, People *v.* Bank of Hudson, 6 Cow. 217, where it is held that the information in such case is merely descriptive, and the use of the corporate name is not an affirmation that the respondent is actually a corporation, but only that by that name acts have been done as alleged in the information, and the respondent is then called upon to show by what authority such acts have been done.

[2] State *v.* Commercial Bank of Manchester, 33 Miss. 474. And see Attorney General *v.* Michigan State Bank, 2 Doug. 359.

[3] State *v.* Brown, 33 Miss. 500. See S. C. 34 Miss. 688.

privileges and franchises which it is charged with having usurped, since the charter shows that the corporation was legally created in the first instance, and the law will presume its continued existence down to the time of filing the information.[1]

§ 662. Where the object of the information is to correct the usurpation of a corporate office, a different doctrine prevails from that applicable to the cases above considered. And where the information is filed for the usurpation of an office in a corporation not created by a special charter, but incorporated under the general law of the state for that purpose, the existence of the corporation, as such, becomes a jurisdictional fact, which must be clearly set forth in the pleadings, and the mere allegation of corporate existence is insufficient, being only a conclusion of law drawn by the pleader. The corporation being organized under the general law, by acts *in pais*, the mere allegation of corporate existence can not apprise the court of the facts constituting such corporate existence, and until this is shown it is not made to appear that there has been a usurpation of any office.[2]

[1] Attorney General *v.* Michigan State Bank, 2 Doug. 359.

[2] People *v.* DeMill, 15 Mich. 164. The reasons in support of the doctrine of the text, are very clearly laid down in the opinion of Mr. Justice COOLEY, as follows: "When any person or association of persons is charged with usurping the franchise of a corporation, it is sufficient for the attorney general to call upon them, in general terms, to show by what authority they claim the right to exercise such franchise; but when the very nature of the proceeding is such as to assume the actual existence of a corporation, and it is alleged that defendants usurp some authority therein, no ground whatever is shown for calling upon defendants to show their right until it is made to appear that a corporation exists. The claim to a corporate franchise, which does not exist in fact, may be a great public wrong, demanding immediate redress; but the claim to an office in a corporation which has no existence, can hardly be a matter of public concern, unless accompanied with the attempt to exercise a corporate franchise; in which case the remedy would be an information, not for the unlawful intrusion into an office, but for the usurpation of the franchise. The information in a case like the present must, therefore, show that a corporation exists; for until that is shown, it is not made to appear

§ 662 *a*. While the filing of an information against a corporation by its corporate name is treated as admitting its corporate existence *de facto*, its legal right to exist is not thereby admitted, nor the right to exercise any other franchise specified in the information. And when, in such case, a charter or statute, regular upon its face, is pleaded by respondent as its warrant for the exercise of the franchise in question, it is competent for relator to show by way of replication that respondent has forfeited its charter by its own act, or to show that the charter does not confer the particular franchise in dispute. And if, in such case, it is shown that the charter does not confer the right to exercise the particular franchise, judgment of ouster as to such franchise may be rendered.[1]

§ 663. Where the proceedings are instituted * 487 against certain persons named, and others alleged to be too numerous to be included in the record, charging them with usurping the franchises of a corporation, and the respondents named plead the existence of the corporation with full right to use the franchises in question, and allege that they are directors, but neither admit nor deny the allegations that they assume to be members of the corporation, except in so far as they admit that they assume to act as directors, the court will, in the absence of evidence to the contrary, regard them as claiming to be members of the corporation, and will consider their plea as a plea in behalf of all the respondents.[2]

§ 664. The doctrine may now be regarded as well established, that an information in the nature of a quo warranto is the appropriate remedy against persons usurping the fran-

that there is any office into which the defendants can intrude. The precedents in proceedings against public officers, are not applicable, in all particulars, to the case before us; since those are cases where the courts must judicially take notice of the existence of the officers, and no allegations are necessary to show how they were created."

[1] State *v.* Pennsylvania &. O. C. Co. 23 Ohio St. 121.

[2] State *v.* Sherman, 22 Ohio St. 411.

chises and privileges of a board of trustees of an incorporated church association.[1] And an information against the trustees of a church, charging them with having wrongfully usurped their office and with having unlawfully taken possession of the church property, excluding the relators, the duly-elected and qualified trustees therefrom, states a sufficient cause of action.[2] And it is to be observed that in cases involving the right of appointment to offices of trust, which are controlled by and subject to the authority of ecclesiastical tribunals, or denominational and sectarian authorities, the civil courts are sometimes obliged, from the nature * 488 of the case, to follow and be guided by the decisions of the ecclesiastical tribunals, as to the qualifications for the offices in question, and they may be governed by the action of such tribunals in passing upon the questions presented by the information. Thus, where it is provided by the charter of an educational institution, that vacancies in its trustees shall be filled by a certain presbytery of a church, in determining what body is entitled to fill such vacancies, the civil courts will be governed by the decision of the supreme judicature of that church having jurisdiction of the matter, and if it has decided that the presbytery claiming the right to fill the appointment is no longer connected with the church, such decision will be considered final on proceedings by information against the trustees.[3]

§ 665. While, as we have just seen, the jurisdiction by information in the nature of a quo warranto is properly exercised against persons usurping offices in religious incorporations, it does not, in this country, extend to ministers of churches. The position of a minister is considered by the courts as in no sense a public office, neither is it in any manner connected with the administration of justice, nor is it a right or franchise belonging to the state, each religious asso-

[1] Commonwealth v. Arrison, 15 S. & R. 127; Commonwealth v. Graham, 64 Pa. St. 339. And see State v. Farris, 45 Mo. 183.

[2] Creek v. The State, 77 Ind. 180.

[3] State v. Farris, 45 Mo. 183.

ciation being left to the management of its own concerns without control by the state, save where civil and property rights are involved. Hence an information will not lie to show by what authority one exercises the functions of a minister in a religious incorporation, especially where the person seeking the aid of the court and the respondent do not claim under the same act of incorporation.[1]

§ 666. Upon the question of what constitutes such a surrender of corporate rights as to amount to a forfeiture of the franchise warranting judgment of ouster, the general rule is laid down that the suffering an act to be done which destroys the end and aim for which the corporation was creat-
* 489 ed, is equivalent to a direct surrender of the franchise.

Thus, where it is alleged in the information that the respondent, a banking association, has assigned and transferred so much of its property as to render it unable to continue banking operations, a sufficient case is presented to warrant a forfeiture.[2] Where a mis-user is relied upon as the foundation for proceedings to procure a forfeiture of the corporate franchise, it must appear that there has been such a neglect or disregard of the corporate trust, or such a perversion of it to private purposes, as in some manner to lessen the utility of the corporation to those for whose benefit it was instituted, or to work some public injury. In other words, the mis-user must be in some sense a misdemeanor, in violation of the trust.[3]

§ 667. To constitute a non-user of the franchise a sufficient ground for a forfeiture upon an information in quo warranto, there must be a total non-user, and in the case of a banking association, a mere refusal to pay, unless arising from continued insolvency, is no ground for a forfeiture.[4]

[1] Commonwealth v. Murray, 11 S. & R. 73.

[2] People v. Bank of Hudson, 6 Cow. 217.

[3] State v. Real Estate Bank, 5 Ark. 595.

[4] People v. Bank of Washington, 6 Cow. 211; People v. Bank of Hudson, 6 Cow. 217. As to the effect of long non-user of its franchises, in a proceeding in quo warranto against a corporation to procure its

And it is important to observe that the right to prosecute for a forfeiture ceases with the cause on which the information is based. When, therefore, an information is filed against a banking corporation for a forfeiture of its franchise because of insolvency, although the corporation has actually been in an insolvent condition, yet if the proceedings are not taken until after it has again become solvent, respondent is entitled to judgment upon a demurrer presenting this question.[1]

§ 667 *a*. While the general rule is well established that in proceedings in quo warranto the respondent, claiming the right to exercise the franchise in question, must prove his title thereto, the state being required to prove nothing, yet when it is admitted that respondent has had a good title to the franchise, the proceeding being based upon an alleged abandonment and forfeiture of the franchise, the affirmative of such issue and the burden of proof are with the state. Especially is this the rule, under a statute requiring that the issues in proceedings in quo warranto shall be tried as in other civil causes.[2]

§ 668. The information will not be granted to disturb the affairs of a corporation in behalf of persons who show no injury to their franchise, and upon the ground of a mere mistake on the part of the corporate officers, there being no usurpation and no new privilege or franchise being acquired.[3] And it is an additional ground for refusing to interpose in such a case, that the persons complaining were * 490 present and acquiesced in the action of which they complain.[4]

§ 669. As regards the effect of proceedings by information, upon an action already pending at law in the ordinary form against the same corporation, it is held that the pend-

dissolution, see State *v.* Pipher, 28 Kan. 127.

[1] People *v.* Bank of Niagara, 6 Cow. 196; People *v.* Bank of Hudson, Ib. 217.

[2] State *v.* Haskell, 14 Nev. 209.

[3] King *v.* Stacey, 1 T. R. 1.

[4] King *v.* Stacey, 1 T. R. 1.

ency of the information does not of itself confer any right to quash upon motion the proceedings in the action at law. Such a motion to quash, being allowable only for defects appearing on the face of the proceedings, can not, therefore, be sustained because of the subsequent institution of proceedings by information against the same corporation.[1]

§ 670. The information will not be allowed when its object is to attack a charter granted by the sovereign, by assailing the title of an officer appointed under the charter, and who is in actual possession of his office.[2] And a corporation can only be ousted from the exercise of franchises beyond the scope of its charter, in a proceeding to which it is a party; and this will not be done upon an information against the officers alone of the corporation.[3] Nor will the remedy by information be extended to the case of a mere servant of a corporation, who exercises no functions or authority under the sovereign power.[4]

§ 671. Where the information is brought for the purpose of testing the right to an office in a private corporation, the proceedings of the board of directors of the corporation in the removal and appointment of officers, within the scope of their powers are to be presumed correct until the contrary is shown. Every reasonable intendment is made in favor of the regularity and correctness of such proceedings, and the burden of proof, therefore, rests upon him who assails their correctness.[5]

§ 672. A clause in the charter of an incorporated company providing that it shall not be dissolved before a certain specified time, or until all its debts are paid, does not secure to the corporation immunity from a dissolution by a seizure of its franchises on proceedings by information. Such a clause is regarded rather as a right retained by the state

[1] Commercial Bank *v.* McCaa, 16 Miss. 720.

[2] Queen *v.* Taylor, 11 Ad. & E. 949.

[3] State *v.* Taylor, 25 Ohio St. 279.

[4] King *v.* Corporation of Bedford Level, 6 East, 356.

[5] State *v.* Kupferle, 44 Mo. 154.

than as a privilege granted to the corporation, being intended only to prevent its voluntary dissolution * 491 before the expiration of its charter, without payment of its debts.[1]

§ 673. Upon a quo-warranto information to test the title of directors in an incorporated company, a plea by the respondents setting up the fact of their resignation and the appointment and qualification of their successors, constitutes no answer to the information. If such a defense were to be allowed, it would be in the power of respondents, by successive resignations, to render the proceedings wholly ineffectual. And such a case is clearly distinguishable from cases where the term of office expires pending the proceedings.[2]

§ 674. Where the information is sought to try the title to corporate offices, the court, in determining who was actually elected to the office, will not give the same effect to votes offered but not received, as is given to votes actually received by the judges of election. It can only oust the respondents from the office which they assume to hold, if they have not been legally elected thereto, and afford the party whose votes were improperly rejected an opportunity of voting at another election.[3]

§ 675. As regards the time when the proceedings should be instituted to test the title to a corporate office, while it is conceded that if the information be brought before the expiration of the term of office, it may be continued and determined after its expiration, yet the rule is otherwise when the term of office has already expired, and the title to a defunct office will not be tried in a proceeding instituted against the successor in office.[4]

§ 676. Where the information charges respondents as individuals with having usurped and exercised the privileges

[1] State Bank of Indiana v. The State, 1 Blackf. 267.

[2] State v. McDaniel, 22 Ohio St. 354.

[3] State v. McDaniel, 22 Ohio St. 354.

[4] Commonwealth v. Smith, 45 Pa. St. 59.

tion in the nature of a quo warranto, as exercised in that country, has been almost wholly confined to cases affecting offices or franchises in municipalities, and the reports * 494 afford but few instances where the remedy has been applied to private or trading corporations, and still fewer where it has been invoked to determine questions of disputed title to public office. In the United States, the information has been less frequently employed against municipal corporations, although the propriety of the remedy in such cases is satisfactorily established.[1]

§ 679. In England, the information was formerly employed when it was desired to seize into the hands of the crown the franchises and liberties of any municipal corporation, and the remedy was freely resorted to by Charles II. and James II. for this purpose. Indeed, the jurisdiction by quo-warranto information, during the reign of these monarchs, was employed exclusively to strengthen the power of the crown, at the expense of the principal municipalities throughout the kingdom, and it was invoked upon the most frivolous pretexts, and judgments of forfeiture and seizure were had in many cases affecting the oldest and wealthiest municipalities in the kingdom. These extraordinary proceedings reached their culmination in the case of the city of London, decided in the thirty-fifth year of Charles II., in which judgment of forfeiture of the entire franchises of the city was pronounced, and they were seized into the hands of the crown.[2] The case

[1] See upon the general subject of quo warranto to municipal corporations, Dillon on Municipal Corporations, ch. XXI, where a valuable collection of cases may be found.

[2] Rex *v.* City of London, Hilary Term, 35 Charles II., 8 Harg. State Trials, 545. The information in this case set forth that the mayor, commonalty and citizens of London claimed and used, without warrant, the liberties and privileges, first, of being a body corporate and politic, by the name of mayor and commonalty and citizens of the city of London; second, of having and electing sheriffs of the city and county of London and county of Middlesex; third, that the mayor and aldermen should be justices of the peace and hold sessions of the peace. To these several charges of usurpation, the municipal authorities pleaded in substance, first, that

has never been regarded as a precedent in England, and the judgment was reversed by a subsequent act of * 495 parliament, which also provided that the franchises

they were a body corporate, etc., by prescription, and second, by divers charters from the crown, under which they justified the use of the franchises in question. The attorney general replied, denying that they were a body corporate, and pleading, first, that they had illegally exacted money from the king's subjects by a pretended by-law, levying charges upon persons selling provisions in the public markets; second, that the respondents had voted to exhibit a certain petition to the king, setting forth that, by the prorogation of parliament, the prosecution of public justice of the kingdom had received interruption. To this the municipal authorities pleaded several pleas by way of rejoinder, and protested that no act, deed or by-law made by the mayor, aldermen and common council, was the act or deed of the body corporate. They also rejoined that the tolls imposed upon persons coming to market were reasonable and just, and that the city was fully authorized to exact such tolls to provide for the expenses of maintaining the markets, the right to exact tolls being founded upon prescription. Other pleadings followed on both sides, but the above sufficiently indicate the issues presented. The case was exhaustively argued both for the crown and the city, the principal burden of the argument turning upon the question whether the municipal franchises could be forfeited and seized into the king's hands. The court were unanimously of opinion: "1. That a corporation aggregate might be seized. That the statute 28 E. 3, cap. 10, is express, that the franchises and liberties of the city, upon such defaults, should be taken into the king's hands. And that bodies politic may offend and be pardoned, appears by the general act of pardon, 12 Car. 2, whereby corporations are pardoned all crimes and offenses. And the act for regulating corporations, 13 Car. 2, which provides that no corporation shall be avoided for anything by them misdone or omitted to be done, shows also that their charters may be avoided for things by them misdone, or omitted to be done. 2. That exacting and taking money by the pretended by-law was extortion, and a forfeiture of the franchise of being a corporation. 3. That the petition was scandalous and libellous, and the making and publishing it a forfeiture. 4. That the act of the common council was the act of the corporation. 5. That the matter set forth in the record did not excuse or avoid those forfeitures set forth in the replication. 6. That the information was well founded. And gave judgment that the franchise should be seized into the king's hands, but the entry thereof respited till the king's pleasure was known in it."

of the city should never be seized for any misdemeanor or forfeiture.[1]

§ 680. In this country, it is believed that no instances can be found where the charter or franchises of a municipal corporation have been forfeited or seized upon proceedings in quo warranto, on account of misconduct of corporate * 496 officers. The privileges and franchises granted by charters to municipal bodies, under the American system, are deemed rather for the benefit of the people of the municipality, than for its officers, or for the corporation as such. Hence the courts will not permit usurpations on the part of municipal officers, or contests between such officers as to their relative functions and powers, to be used as the foundation for proceedings in quo warranto to forfeit the franchises of the municipality. The charter being the charter of the people, their rights and privileges are not to be taken away because of contests between corporate officers as to their relative rights, since any usurpation on the part of such officers may be corrected by suitable process, without resorting to a forfeiture of the franchises and liberties of the citizens and corporators.[2]

[1] 2 William & Mary, ch. 8, 9 English Statutes at Large, 79.

[2] Commonwealth *v.* City of Pittsburgh, 14 Pa. St. 177. See also Dillon on Municipal Corporations, § 720. In Commonwealth *v.* City of Pittsburgh, the doctrine of the text was very clearly enunciated in the opinion of the court, by Mr. Justice COULTER, as follows: "The attorney general is required by the 3d section of the act in relation to writs of quo warranto, passed 16th of June, 1836, whenever he shall believe that any corporation has forfeited its corporate rights, privileges, or franchises, to file a suggestion and to proceed to the determination of the matter, and in pursuance of this power he has filed this suggestion against the corporation of the mayor, aldermen, and citizens of Pittsburgh; and alleges that by the ordinance of the councils which repealed a certain prior ordinance, passed in 1831, vesting in the mayor the appointment of the night watch and patrol; also by vesting the appointment of said watch in a committee of councils, and finally by the appointment of the night watch by the councils themselves, the said corporation has claimed to use, and has used unlawfully, liberties and franchises not belonging to it; and all which privileges the said corporation has usurped against the commonwealth,

§ 681. The statute of Anne extended the remedy by quo-warranto information, which had before been * 497 considered much in the nature of a prerogative one, to private citizens desiring to test the title of persons usurping or executing municipal offices and franchises, and rendered any person a competent relator in such proceedings who

etc.; and a rule was granted, at his instance, against the corporation, to show cause why a writ of quo warranto should not issue against the said corporation, commanding them to appear and show by what authority they exercised such privileges and franchises. The corporation appeared at the return of the rule, and was heard by its attorneys, and the commonwealth was heard by the representative of the attorney general. The corporation, even admitting all the allegations in the suggestion, has not usurped from the commonwealth any liberty, franchise, or privilege; nor has it by any thing, or act, shown to this court, invaded the rights or privileges of any other corporation, nor the rights or privileges of the people at large. It has used no franchise, or privilege, that did not belong to the corporation. It has done nothing more than use privileges and franchises, unquestionably belonging to the corporation, and incident to the emergencies and requirements of its beneficial existence, to wit: the appointment of a night watch. That the corporation possessed this power, will hardly be questioned by any reasonable man. That two of the functionaries, the legislative department, the councils, and the executive department, the mayor, have disputed about their respective powers in the matter, is admitted. But the charter was not granted for the benefit of the mayor or the councils either, but for the benefit of the people of the great municipality. The law has abundant means and power of settling this dispute between the functionaries, without detriment to the people or corporation. Then why should the people be punished for the wrangling of the officers. The charter is the charter of the people, and shall they be punished by wresting it from them, and throwing their whole concerns into confusion and disorder, because the mayor and council dispute? The municipality of the city government has been built up and perfected through a course of many years, and by many acts of assembly; and by many by-laws and ordinances, as they were suggested by experience and time. And shall all this fair fabric, on which lay so many duties and obligations, on which most of the welfare and security of the citizens of a great community depend, be torn down and destroyed by the turbulence of an officer or officers? A case has been cited from the reign of the Stuarts in England, as authority and precedent, in the instance of the forfeiture of the charter of London, for irregularity in passing some ordinance. But it must be recollected that the object and pol-

might first obtain leave of the court to file an informa-
* 498 tion. It also provided for judgment of ouster, as well as a fine against persons found guilty of usurping or intruding into such offices and franchises, and authorized the court to grant a reasonable time for pleading, besides fixing the costs of the proceedings.[1] The object of the statute of Anne, in as far as relates to the usurpation of corporate franchises, was held to be the promotion of speedy justice against such usurpation, as well as to quiet the possession of those who were lawfully entitled to the exercise of the franchise. And the effect of the act was to vest the court with

icy of the royal government at that time, was to circumvent the liberties of the people, and one means of doing that was to forfeit the franchises of corporations, through the instrumentality of pliant judges who then held the office at his will, to the use of the king, who granted them out to his creatures upon principles less favorable to liberty. But after the revolution in 1688, when that race was driven from the throne, the parliament reversed this decision or judgment, and enacted that thereafter, the franchises of the city should not be forfeited for any cause by the courts. And why should the franchise of any municipal government be forfeited on account of the misconduct, alleged or real, of its officers? The usurpation of officers can be corrected by suitable means, leaving untouched the rights, franchises, and liberties of the citizens and corporators. If the mayor, who we must believe from the force of the suggestion, is the real complainant, had filed a suggestion against the council for usurping his functions, this court could, under the eighth section of the act relating to writs of quo warranto, have made him, although the relator, a party respondent also, and then determined on his rights and authority, as well as on those of the councils; and could have pronounced judgment of ouster against whoever was in the wrong; and in such case, by the 15th section of the act of April 13, 1850, being a supplement to the act relating to orphan's courts, this court could have appointed trustees from among the citizens eligible to office in the corporation, as trustees to take charge of the corporation, until new officers were chosen according to the provisions of the charter. But in this proceeding we could pronounce no judgment, except forfeiture of franchises and of the charter, against the corporation, which would dissolve it and return it to its original elements. We can not think of such a result; there is not the slightest cause for it. The proceeding has worn a grotesque appearance, in my judgment, from the beginning. The rule is therefore discharged."

[1] See Appendix, A.

discretionary powers as to granting leave to file the information, which is not allowed as of course, but only in the exercise of a sound judicial discretion applied to the particular circumstances of each case.[1]

§ 682. In England, the rule is believed to be absolute that an information will not lie against persons for claiming to act as a private corporation, unless the proceedings are instituted in the name of the attorney general.[2] A distinction, however, is recognized between such cases and cases of corporate bodies exercising powers of government and municipal authority. And an information will lie in * 499 behalf of a private relator to test the right of an officer in a municipal corporation, upon grounds affecting his title, and it affords no valid objection to the exercise of the jurisdiction in such a case, that the title of every other officer of the municipal body is tainted with the same defect.[3] But even in the case of a municipal corporation, it is wholly discretionary with the court to grant or withhold permission to file the information. And the fact that a dissolution of the body corporate may reasonably be apprehended from making the rule for the information absolute, while not a conclusive objection to interfering, is a consideration proper to be taken into account in passing upon the application. So the fact that the affidavits in support of the rule impute no corrupt or fraudulent motives for the acts complained of, and do not allege that such acts have resulted in any inconvenience, or have produced any hardship or injustice, may properly be taken into consideration.[4] And it is always in the discretion of the court of kings bench to grant or refuse leave to file the information in behalf of individual corporators, such cases being distinguished from those where the

[1] Rex v. Wadroper, Burr. 1964.

[2] See King v. Ogden, 10 Barn. & Cress. 230.

[3] King v. White, 5 Ad. & E. 613, the case distinguished from King v. Ogden, 10 Barn. & Cress. 230.

[4] King v. Parry, 6 Ad. & E. 810. See also State v. Tolan, 4 Vroom, 195.

attorney general prosecutes in behalf of the government and where the information may be exhibited without leave of the court.[1]

§ 683. A similar discretion is exercised in this country in granting or withholding leave to file the information at the instance of a private relator. And the fact that the successful prosecution of the information, which is sought to try respondent's right to the office of alderman in a municipal council, would result in the suspension of all municipal government in the city for a long period of time, is a proper consideration to be addressed to the court. If, in such case, the only defect in respondent's title is a mistake in the day of election, there being no allegation of fraud or cor-
* 500 ruption against any person connected with the election, the court may properly withhold leave to file the information.[2]

§ 684. The creation of corporate franchises being an attribute of sovereignty, only to be exercised by the supreme power in the state, all who presume to exercise such franchises without due authority are liable to proceedings by information in the nature of a quo warranto. And it is held in Vermont, where it is sought to exercise the privileges and powers of a municipal corporation, without authority of law, that an information is the proper remedy, and the court will give judgment that the pretended corporation be dissolved.[3]

[1] King *v.* Trevenen, 2 Barn. & Ald. 479.

[2] State *v.* Tolan, 4 Vroom, 195.

[3] State *v.* Bradford, 32 Vt. 50. The court, REDFIELD, C. J., say: "We are satisfied from the evidence in the case, that there could not have been a legal majority of the voters present at the meeting in favor of accepting the charter, and that it did not, therefore, become a binding law. The organization, therefore, under it, is a mere usurpation of corporate franchises, without any legal warrant. In such cases the law is well settled, in England, that upon the information of the attorney general, the court of kings bench will abate and dissolve the corporation, whether it be a private or public one. When the corporation is of a public character, like a town or village, which constitute integral portions of the sovereignty itself, there is more propriety in visiting the usurpa-

§ 685. The propriety of a quo-warranto information, as a means of determining the right to hold offices in municipal corporations, is too well established to admit of controversy.[1] And while it is true that the common council of a city is, to a certain extent, a legislative body, yet it bears no such relation to a purely legislative body, as the legislature of a state, as to deprive the courts of their jurisdiction by quo warranto over the municipal body. An information will therefore lie to forfeit the office of members of a city council, notwithstanding the council is made, by an act of legislature, the judge of the qualifications of its own members, and notwithstanding the existence of a remedy by impeachment for misdemeanors in office.[2] Where, however, a * 501

tion of these important functions of sovereignty with this formal denial of their right to exercise such usurpation, than in the case of a mere private corporation, but the law seems to be the same in either case."

[1] Commonwealth *v.* Meeser, 44 Pa. St. 341; Commonwealth *v.* Allen, 70 Pa. St. 465.

[2] Commonwealth *v.* Allen, 70 Pa. St. 465. This was an information in the nature of a quo warranto, calling upon respondents to show by what right they held the office of common councilmen of Philadelphia, the ground of forfeiture relied upon being that they were also sureties on the official bond of the city treasurer. An act of legislature provided that it should be unlawful for any councilman to be surety upon such official bond, and that a violation of the act should forfeit his office. The respondents demurred upon the ground that by an amendment to the city charter it was provided that "the select and common council, respectively, shall in like manner as each branch of the legislature of this commonwealth judge and determine upon the qualifications of their members," and that therefore the proper tribunal to determine the question was the common council itself. It was also urged, as a ground of demurrer, that the statutory remedy by impeachment should be followed. The opinion of the court was delivered by AGNEW, J., as follows: "We can not doubt the jurisdiction of the court in this case. There is no true analogy between the state legislature and the councils of a city. Their essential relations are wholly different. The councils are in no proper sense a legislature. They do not make laws, but ordinances; nor are the members legislators, with the constitutional privileges and immunities of legislators. The councils owe their existence, their rule of action, their privileges and their immunities solely to the law, which stands behind and above them; and their ordinances have their binding

city council is empowered by law to determine in the first instance the result of an election to the office of mayor,

force, not as laws, but as municipal regulations, only by virtue of the law which infuses them with vigor. Hence all those decisions which evince the unwillingness of courts to interfere with the members of the legislature have no place in the argument. If the councils of a city, no matter how large, may defy the law under which they exist and exercise all their powers, so may the councils of the most humble borough, and thus the law of the land be violated with impunity, unless the courts of justice have power to curb their deviations and correct their misdeeds. The right of this court to issue the writ of quo warranto to determine questions of usurpation and forfeiture of office in a public corporation can not be questioned. Its powers, fully established by the general assembly, 22d May, 1722, 1 Smith's Laws, 131, and repeated in the act of 16th June, 1836, Purd. 928, pl. 19, have been recognized in numerous decisions, to some of which I may refer: Commonwealth *v.* Arrison, 15 S. & R. 130; Commonwealth *v.* McCloskey, 2 Rawle, 369–81; Commonwealth *v.* Jones, 2 Jones, 365; Cleaver *v.* Com. 10 Casey, 283; Lamb *v.* Lynd, 8 Wright, 336; Updegraff *v.* Crans, 11 Wright, 103; Kerr *v.* Trego, id. 292. * * * What obstacle, then, does the city charter oppose to the authority of the court? It is said that councils have power in like manner as each branch of the legislature to judge and determine the qualification of their members. Granting that, it does not follow that the authority of the court is taken away to inquire into a forfeiture, which does not take place until the member has been admitted to his seat. It is only then it becomes necessary to enforce the law by giving judgment of ouster. If councils had not admitted the member to his seat there would have been no violation of law, and consequently no forfeiture. Conceding that the power to inquire into the qualification of a member implies a power to declare his disqualification, the omission of the council to make the inquiry is not a bar to the legal proceedings to enforce a salutary law. The offense, beginning only when the member unites in himself the double relation of councilman and surety, is continuing in its nature so long as he continues to be surety and councilman at the same time. If, then, the council suffer the oath to be administered *sub silentio*, or fail afterwards to inquire into and declare the disqualification, how can it be argued that the forfeiture which took effect *eo instanti* when the member was sworn in, and continues while the prohibited relation continues, can not be judicially ascertained and declared? This would set the council above the court, for it is the court which command the inquiry. The error is in confounding disqualification with forfeiture, so far as to suppose they are equivalent expressions. The fact that a man is surety for a corporation officer is a cause of dis-

the decision of the council is not subject to revision in a proceeding in quo warranto.[1]

§ 686. We have already seen that the acquiescence of members of a private corporation may be such as to estop them from relief by information against officers of the corporation, and the principle applies with equal force in the case of municipal corporations. And where a * 502 rule was asked requiring the respondent to show cause why an information should not be filed against him for exercising the office of mayor of a municipality, on the ground of his having been proposed and elected on the same day, contrary to a by-law requiring the election to be * 503 on a day subsequent to that on which he was proposed, the rule was discharged with costs, upon its being shown that the relator was party to an agreement made by the corporation not to enforce the by-law.[2] And it has been held that the state itself, by long acquiescence and by the continued recognition through its officers of a municipal corporation, might be precluded from maintaining an information

qualification to take the seat, but when the seat is taken it becomes a cause of forfeiture. As a disqualification the councils may refuse the seat, and even after he has taken it they may remove him by reason of continuing disqualification. But when actual forfeiture takes place by the union of the relations of surety and councilman, if the council fail to inquire into what they may consider the continuing disqualification, what clause of the charter, or what principle of law, robs the court of its necessary jurisdiction to inquire into the violation of the law, and oust the sitting member from a seat which he no longer rightfully holds? The whole argument against the power of the court is in effect to declare the councils superior to the law. But the law which declares the forfeiture is the true superior, and no omission or device of councils can retain a member in his seat who has forfeited it by his illegal act. The demand of the law can not be set aside by the non-action or wrong action of a body wholly subordinate to it." But in Commonwealth v. Henszey, 81½ Pa. St. 101, it is held that proceedings in quo warranto will not lie to oust one from the office of member of a city council, when a specific remedy at law is provided under a statute making the council the judge of the qualifications of its members.

[1] Seay v. Hunt, 55 Tex. 545.

[2] King v. Mortlock, 3 T. R. 301.

to deprive the municipal body of franchises which it had long exercised in accordance with a general law of the state.[1] But the fact that three out of four of the relators have acquiesced in the election of the officer, which they now seek by information to impeach, affords no bar to granting the information at the relation of the fourth, who did not concur in the election.[2]

§ 687. While, as we have thus seen, the rule is well established that acquiescence in the corporate election or other proceedings which are afterward made the foundation for a quo warranto information, is a good ground of objection to granting the relief, yet the acquiescence relied upon as an estoppel must be such as to have conduced in bringing about the condition of things complained of, and where the relators have not lain by *mala fide*, and have not contributed by their own conduct to the grievance complained of, they are not prevented from making the application.[3] So, where the relators, at the time of holding an election for a municipal office, objected thereto, the fact of their having subsequently made no opposition to the election of the same officer to another office of which the former was a necessary * 504 qualification, does not constitute such an acquiescence in the original defect of title, as to preclude them from seeking relief by information within the time allowed by law.[4] But where the relator was actually present and concurred in the election, though ignorant of any ground of objection thereto, he is estopped by his acquiescence from afterward filing an information, the governing principle being that he acquiesced in the objectionable election at the time it was held.[5]

§ 688. To warrant the granting of a quo-warranto information to test the right to hold and exercise a municipal office, the corporation must be actually in existence, and the mere

[1] State *v.* Leatherman, 38 Ark. 81.
[2] King *v.* Symmons, 4 T. R. 224.
[3] King *v.* Morris, 3 East, 213.
[4] King *v.* Clarke, 1 East, 38.
[5] King *v.* Trevenen, 2 Barn. & Ald. 479.

assertion of a right to the office after an actual dissolution of the corporation is not of itself sufficient to warrant the court in interfering, there being no civil rights in controversy, and the claim to the office being a mere nullity.[1] Nor will an information lie against a municipal officer to show by what title he exercises his office, where it is claimed that he has accepted an office incompatible therewith, unless it is clearly shown that he was duly and regularly appointed to fill the second office.[2] But the fact that one has been sworn into a municipal office, *de facto*, although the swearing may have been defective in law, constitutes a sufficient user to warrant proceedings by information to test his right to the office, the case being distinguished from that of a mere naked claim to the office.[3]

§ 689. While the principles thus far established indicate the tendency to a somewhat liberal use of quo-warranto informations, as a means of correcting the usurpation of corporate privileges, the courts will not entertain such informations for the purpose of interfering with or declaring void the legislative action of a municipal body, such as the common council of a city. The power of municipal legislation being properly vested in such a body, the courts will not permit the use of this remedy to inquire into or challenge the manner in which this power has been exercised, nor is it within * 505 the legitimate scope of the proceeding by information to declare null and void legislative acts of such a municipal body.[4] Nor will the charter of a municipal corporation be

[1] King *v.* Saunders, 8 East, 119.

[2] Rex *v.* Day, 9 Barn. & Cress. 702.

[3] King *v.* Tate, 4 East, 337.

[4] State *v.* City of Lyons, 31 Iowa, 432. This was an information in the nature of a quo warranto, alleging that the common council of the city had passed certain ordinances vacating a portion of one of the city streets, without lawful authority, and praying that judgment be rendered declaring the ordinance null and preventing the city from attempting to vacate the street. Mr. Justice COLE, delivering the opinion of the court, says: "Our attention has not been directed to nor have we been able to find any case in the books where a proceeding in quo warranto, or information in the nature thereof, has been en-

forfeited by proceedings upon an information, because of the passage by the corporate authorities of an alleged illegal ordinance in which they have transcended their powers, the offense charged being at the most but an error of judgment, rather than a willful abuse of power.[1]

§ 690. The object of the information being to correct the usurpation of an office or franchise by persons not properly entitled thereto, it does not lie to compel the performance of a duty, although such duty is connected with the exercise of the franchise. And where a municipal corporation neglects to perform a duty incumbent upon it by law, the grievance can not be remedied by information. Indeed, the rule seems to result necessarily from the nature of the judgment which is given in proceedings by information against a corporation, which is, either that the franchise usurped be seized to the state, or judgment of ouster and fine, and such judgment in either form would be clearly inadequate as a remedy for the neglect to perform a corporate duty.[2] And where a municipal corporation has, from time to time, made subscrip-
* 506 tions to the stock of railway companies, claiming the power to make such subscriptions and to levy taxes for their payment, and they are afterwards authorized and confirmed by an act of legislature, an information will not be allowed for the purpose of questioning their validity.[3]

§ 691. Where it is apparent to the court that the merits of an election to a municipal office are sufficiently presented, even though sworn only upon information and belief, and the

tertained for the purpose of declaring void or annulling a legislative act, whether passed by a state or an inferior municipal legislature. It is not necessary for us to distinctly determine in this case whether or not, under our statute, such a proceeding can under any circumstances be maintained, since we ground our decision herein upon the special facts set forth in the information."

[1] State v. Town Council of Cahaba, 30 Ala. 66.

[2] Attorney General v. Salem, 103 Mass. 138.

[3] State v. City of Charleston, 10 Rich. 491.

respondent has made no denial thereof in answer to the rule to show cause, the information will be allowed, there being enough shown to put the matter in a course of inquiry.[1]

§ 692. At the common law, no definite period of limitation was fixed, within which the information should be filed. The court of kings bench, however, finally established the rule, that an information to determine the right to exercise a franchise in a municipal corporation, must be brought within twenty years, and that after twenty years uninterrupted possession, no rule would be granted against the person in possession to show by what right he held and exercised the franchise.[2] As to cases within this period, however, the kings bench held it to be discretionary with the court whether the application should be granted or refused, the limit of twenty years being fixed as the boundary beyond which they would not, under any circumstances, interfere.[3] And it was held that no possession of the franchise for less than twenty years constituted, of itself, an absolute barrier to granting the application.[4] Subsequently, however, the court reduced the period of limitation to six years, beyond which they would not, under any circumstances, suffer a person in possession and enjoyment of the franchise to be disturbed.[5] And the same period of six years was afterwards fixed by statute as the limitation to informations for the exercise of any office or franchise in any city, borough, or town corporate.[6] And * 507 this statute was construed to mean six years before making the rule for the information absolute, and not six years before granting the rule *nisi*.[7] By a still later statute it was provided, that applications to the court of kings bench for the purpose of testing the title of any mayor, alderman, councillor, or burgess in any borough, should

[1] King *v.* Harwood, 2 East, 177.

[2] Winchelsea Causes, Burr. 1962; Rex *v.* Stephens, Ib. 433. And see Rex *v.* Wardroper, Ib. 1963; Rex *v.* Daws, Ib. 2120; King *v.* Stacey, 1 T. R. 1; King *v.* Newling, 3 T. R. 310.

[3] Winchelsea Causes, Burr. 1962; King *v.* Newling, 3 T. R. 310.

[4] King *v.* Bond, 2 T. R. 767.

[5] Rex *v.* Dicken, 4 T. R. 282.

[6] 32 Geo. III. Ch. 58.

[7] King *v.* Stokes, 2 Mau. & Sel. 71.

be made before the end of twelve months after the election, or the time when the officer became disqualified.[1]

§ 693. Where, upon an information for exercising the functions of a municipal office, the respondent disclaims the office and franchise, and judgment of ouster is rendered against him, he is thereby barred from showing upon a second information for exercising the same office, that he was duly elected before the former information and judgment, and that he was afterward sworn in under a peremptory mandamus, since the mandamus to swear into an office can confer no title.[2]

§ 694. A distinction is recognized between the usurpation of an office, and the usurpation of a franchise connected with or attached to an office, although proceedings by quo-warranto information are recognized as the appropriate remedy in both classes of cases. Thus, where the proceedings are brought to test the legality of a vote given by the presiding officer of the common council of a city, claiming to be a part of the common council, and to be entitled to vote as such, the case is regarded as the usurpation of a franchise and the information the proper remedy.[3]

§ 695. Upon proceedings in the nature of quo warranto to test the right of an incumbent to a municipal office, it is competent for the court to inquire whether the municipality was legally created, and whether the office had any legal existence, since, if the office were not legally created, there could be no usurpation.[4] And the information will not be allowed to determine the right of a clerk of a board * 508 of municipal officers to hold his place, upon the ground of an alleged irregularity in the election, when the office or position is held at the pleasure of such board, which

[1] 7 Will. IV. & 1 Vict. Ch. 78, § 23.

[2] King v. Clarke, 2 East, 75.

[3] Reynolds v. Baldwin, 1 La. An. 162.

[4] People v. Carpenter, 24 N. Y. 86; State v. Parker, 25 Minn. 215; State v. Coffee, 59 Mo. 59; State v. McReynolds, 61 Mo. 203.

is itself fully competent to do all that is sought by the information.[1]

§ 696. The information will not lie against a municipal officer, as the mayor of a city, where the real purpose of the application is to test the legality of the municipal charter, since the courts will not permit a charter to be repealed in a proceeding directed, not against the corporation, but against an individual corporator or officer.[2]

§ 696 *a*. Under a statute authorizing the filing of informations in quo warranto when any corporation "exercises powers not conferred by law," it is held that a municipal corporation, such as a board of education, falls within the scope of the statute. And when such board has illegally excluded colored children from the public schools, an information will lie to correct their action.[3]

§ 696 *b*. When proceedings in the nature of quo warranto are brought against persons claiming to act as municipal officers, to determine their title to the offices in controversy, the general rule prevails that the burden of proof rests upon respondents. They must, therefore, prove the existence of the corporate franchise which they are alleged to have usurped, and their title to the offices in question.[4]

[1] Bradley *v.* Sylvester, 25 L. T. R. N. S. 459.

[2] Regina *v.* Jones, 8 L. T. R. N. S. 503.

[3] People *v.* Board of Education, 101 Ill. 308.

[4] State *v.* Sharp, 27 Minn. 38.

CHAPTER XVII.

OF THE PARTIES IN QUO WARRANTO.

§ 697. Information only allowed in name of state or public prosecutor.
698. The doctrine in cases affecting corporations; distinction between public and private rights.
699. English rule in cases against corporations.
700. Private relators; effect of statute.
701. Private citizens as relators against municipal officers; must be competent relator in first instance.
702. Interest of relator against municipal corporation in England.
703. Presumption in favor of public prosecutor; can not dismiss to prejudice of relator.
704. Joinder of parties.
705. Territorial judges.
706. The doctrine in Ohio.
707. Leave of court; distinction as between public and private prosecutor.
708. Private persons not entitled to writ in Arkansas.
709. Acquiescence of parties may render them incompetent relators.

§ 697. As regards the proper parties to an * 509 information in the nature of a quo warranto, it is to be observed that while the remedy by information to test the right to a public office is now generally regarded as in the nature of a civil remedy, it still retains the form of a criminal proceeding, so far at least as concerns the parties prosecuting and the title of the cause. And in the absence of statutory regulations to the contrary, the common-law rule still prevails, requiring the proceedings to be instituted in the name of the state or sovereign power, by the attorney general or other prosecuting officer, and a private citizen will not be allowed to file the information in his own name, and of his own volition, since

the law does not contemplate the use of this remedy by individual citizens to redress the wrongs of the state.[1] The principle underlying the rule seems to be, that in * 510 the case of a public office or franchise, the usurpation is a public wrong, and the remedy should therefore be a public one, carried on in the name of the public prosecutor, and the real relator ought not to be allowed to usurp the process for private ends.[2] The same principle is also applied to the case of a motion for a rule to show cause why the information should not be allowed.[3] And while it would seem to be of but little practical importance in whose name the proceedings are instituted, yet the old practice is still adhered to unless otherwise provided by statute. The right to institute the proceedings, or to file the information, is regarded as incident to the office of the public prosecutor or attorney general, and the courts will not examine into the political or other motives which may have led to the filing of the information, nor will they inquire who is the real relator, but it will be presumed that the proceedings are properly instituted by the attorney general.[4]

§ 698. The abuse of a corporate franchise granted by the legislative authority of the state, being a public rather than a private wrong, comes under the same general principle, and where the invasion or abuse of such franchise affects only the

[1] Sir Wm. Lowther's case, Ld. Raym. 1409; Wright v. Allen, 2 Tex. 158; Murphy v. Farmers Bank, 20 Pa. St. 415; Commonwealth v. Burrell, 7 Pa. St. 34; United States v. Lockwood, 1 Pinney's Wis. 359; Cleary v. Deliesseline, 1 McCord, 85; State v. Schnierle, 5 Rich. 299; Lindsey v. Attorney General, 33 Miss. 508; State v. Gleason, 12 Fla. 190; Robinson v. Jones, 14 Fla. 256; Rice v. National Bank, 126 Mass. 300; Barnum v. Gilman, 27 Minn. 466; Harrison v. Greaves, 59 Miss. 453; State v. Stein, 13 Neb. 529. See also State v. Paterson & Hamburg Turnpike Co. 1 Zab. 9; *In re* Bank of Mount Pleasant, 5 Ohio, 249; State v. Moffitt, 5 Ohio, 358; Saunders v. Gatling, 81 N. C. 298; Bartlett v. The State, 13 Kan. 99.

[2] State v. Schnierle, 5 Rich. 299; Cleary v. Deliesseline, 1 McCord, 85; State v. Paterson & Hamburg Turnpike Co. 1 Zab. 9.

[3] State v. Schnierle, 5 Rich. 299.

[4] State v. Gleason, 12 Fla. 190.

public prerogative, and involves no grievance to individual rights, the same general rule applies. The object of the information in such cases being to seize the corporate franchise into the hands of the state, or to work a forfeiture of the charter and a dissolution of the corporation as a body politic, the proceedings will not be entertained upon the rela-
* 511 tion of a merely private citizen, without interest in the controversy, even though leave of the court be first sought for that purpose.[1] A distinction, however, is recognized between cases involving the very existence of the corporate franchise, and such as merely affect the administration of corporate functions or duties affecting only individual rights, such as the election or admission of corporate officers, and in the latter class of cases the jurisdiction may be exercised upon the relation of private persons.[2] But while the information will lie upon the relation of a private citizen for the usurpation of an office in a private corporation, it is largely within the discretion of the court to grant or refuse the application.[3] And one who has no interest in the affairs of a corporation, save such as is common to every citizen, can not sue out a writ of quo warranto to enforce a forfeiture of the corporate franchise and charter, but the proceedings must be taken by some authorized representative of the state. Nor does the fact that the person seeking the remedy is a creditor of the corporation, and has an action pending at law for the recovery of his debt, affect the application of the rule.[4] So it is held that a statute enacting that the attorney general or states attorney may, either of his own accord, or at the instance of a private relator, present a petition for leave to file an information does not obliterate the

[1] Commonwealth v. Allegheny Bridge Co. 20 Pa. St. 185; Murphy v. Farmers Bank, Ib. 415; Commonwealth v. Philadelphia, Germantown & Norristown R. R. Ib. 518; State v. Paterson & Hamburg Turnpike Co. 1 Zab. 9; People v. North Chicago R. Co. 88 Ill. 537.

[2] Murphy v. Farmers Bank, 20 Pa. St. 415.

[3] Gunton v. Ingle, 4 Cranch C. C. 438.

[4] Commonwealth v. Farmers Bank, 2 Grant's Cases, 392.

well-recognized distinctions between informations in behalf of the public to enforce public rights, and those in behalf of individual citizens for the enforcement of private rights. Such a statute, therefore, does not authorize the filing of informations in matters of public right by any relator who may choose to interfere.[1]

§ 699. The English rule with regard to granting leave to file an information against a corporation for a violation of its franchises, is, that where the application is made in behalf of individual corporators, it is addressed to the discretion of the court, which may grant or refuse the application, as it may deem best, the case being distinguished from that of an application by the attorney general in behalf of the government, in which case the information may be exhibited without leave.[2]

§ 700. Notwithstanding the well-settled rule already discussed, requiring the information to test the title to a public office to be filed in the name of the state, or by * 512 its attorney-general, or public prosecutor, the real relator may be, and often is, a private citizen, whose rights are affected by the usurpation, and who sets the public prosecutor in motion. Especially is this true where the information is sought for the two-fold purpose of ousting a usurper from an office and determining the right of another claimant thereto. In such cases the interest of the relator in the subject-matter becomes a question of considerable importance, in order to determine whether he is a proper party upon whose information or relation the proceedings may be had. Even under a statute extending the remedy to "any person or persons desiring to prosecute the same," the question of the relator's interest will be deemed decisive as to the exercise of the

[1] People *v.* North Chicago R. Co. 88 Ill. 537.

[2] King *v.* Trevenen, 2 Barn. & Ald. 479. See King *v.* Ogden, 10 Barn. & Cress. 230; King *v.* White, 5 Ad. & E. 613; King *v.* Parry, 6 Ad. & E. 810. See, as to the right of the attorney general in Indiana to file an information upon his own relation, State *v.* Meyer, 63 Ind. 33.

jurisdiction, and the relief will be granted only in behalf of one whose interests are affected by the matter in controversy. And such a statute does not entitle a private relator to the relief in a case of public right involving no individual or private grievance.[1]

§ 701. Where the object of the proceeding is to test the right of respondent to a seat as a member of the common council of a city, a private citizen may be a competent relator, when it is apparent that he is not a mere volunteer interfering maliciously, but that he represents a large and responsible number of citizens, and is not influenced by merely personal motives.[2] So it is held that any citizen or tax-payer has a sufficient interest in such offices as tax-collector or street-inspector to render him a proper party to institute the proceeding for determining the right to exercise the functions of such offices.[3] So, too, a citizen and tax-payer of a city is a competent relator in an information charging persons with usurping the functions of a board of assessment and revision of city taxes. All that the court requires, in such case, is that the relator should be of sufficient responsibility, that he should act in good faith, and that he is not disqualified by his own conduct with reference to the election which he seeks to impeach.[4] And one who claims title to the office in controversy, and the right to receive its fees and emoluments, has sufficient interest to render him competent as a relator.[5] And where the application for leave to file the information is made by a proper relator, it

[1] Commonwealth v. Cluley, 56 Pa. St. 270.

[2] Commonwealth v. Meeser, 44 Pa. St. 341. See also City of Chicago v. The People, 80 Ill. 496.

[3] Commonwealth v. Commissioners, 1 S. & R. 380; State v. Martin, 46 Conn. 479.

[4] State v. Hammer, 42 N. J. L. 435. But in Kansas, it is held that private citizens, with no other interest than that of tax-payers in a municipal corporation, can not maintain proceedings in quo warranto in their own name against the municipal corporation, but the action must be brought by the state, through its proper legal representatives. Miller v. Town of Palermo, 12 Kan. 14.

[5] Commonwealth v. Swank, 79 Pa. St. 154.

may be granted, notwithstanding it rests upon and is supported by the affidavits of others whose conduct and whose acquiescence in the irregularity complained of have disqualified them as relators.[1] And the English rule is imperative, that there must be a competent relator when the rule to show cause is first moved for, and no amendment * 513 will be allowed in this respect.[2]

§ 702. As regards the degree of interest necessary, under the English practice, to render one a competent relator to an information against a municipal corporation, it is to be observed that the courts are exceedingly averse to entertaining the proceedings in behalf of a mere stranger to the corporation, and while there may be cases where leave would be granted a stranger to institute the proceedings, it can only be done where he presents a very clear case.[3] But where, by the charter of a municipality, it is provided that its government and that of all the people therein shall be vested in the mayor and burgesses, an inhabitant of the municipality has a sufficient interest in the subject-matter to render him a competent relator in an information to test the title of one of the burgesses.[4]

§ 703. Where the information is filed by the proper officer of the state, as by the solicitor-general, duly authorized by law to prosecute informations, the court will presume that the proceedings are had in his official capacity. Nor will this presumption be rebutted by the fact that he has recited in the

[1] King *v.* Brame, 4 Ad. & E. 664; King *v.* Parry, 6 Ad. & E. 810.

[2] Regina *v.* Thirlwin, 9 L. T. R. N. S. 731.

[3] King *v.* Kemp, note to King *v.* Clarke, 1 East, 38. And see King *v.* Stacey, 1 T. R. 1. In King *v.* Kemp, Lord KENYON observes, as to the question of the relator's interest: "If he had shown that his own and other persons' privileges had been injured, he would perhaps have had reason for preferring this complaint; but the fact is otherwise. He comes here as a perfect stranger to the corporation, prowling into other men's rights. I do not mean to say that a stranger may not in any case prefer this sort of application; but he ought to come to the court with a very fair case in his hands."

[4] Rex. *v.* Hodge, note to King *v.* Trevenen, 2 Barn. & Ald. 344.

information an order of one branch of the state legislature requesting him to file such information, the order being rejected as mere surplusage and not affording sufficient ground for sustaining a motion to quash the information.[1] And where, under the laws of the state, it is the duty of the attorney general to file an information upon the relation
* 514 of any person claiming to be rightfully entitled to a public office, while the attorney general may dismiss the proceedings as far as the rights of the people are involved, he will not be allowed to dismiss to the prejudice of the relator, who will still be permitted to prosecute his own claims in the action already instituted.[2]

§ 704. At common law, it would seem to have been proper to join several different persons respondent in one and the same information, when the rights involved and the evidence in support of them were substantially the same.[3] The statute of Anne provided that if it should appear to the court that the several rights of different persons to offices or franchises, might properly be determined on one information, leave might be given by the court to exhibit one such information against the several persons.[4] Under this statute, it is held by the court of kings bench, that where several informations are filed against several different persons, whose rights are identical, the court may consolidate the proceedings, and determine the rights of the parties upon a single information against them all.[5] Where, however, the offense charged against several different respondents, in different informations, is not a joint offense, the court will refuse to consolidate the proceedings, since in such case there must be different informations to enable each respondent to disclaim.[6] And it is not competent for two persons, claiming different offices, to

[1] Commonwealth v. Fowler, 10 Mass. 290.

[2] Attorney General v. Barstow, 4 Wis. 567.

[3] See opinion of Lord MANSFIELD, in Symmers v. Regem, Cowp. 500.

[4] 9 Anne Ch. 20. See Appendix, A.

[5] Rex v. Foster, Burr. 573.

[6] King v. Warlow, 2 Mau. & Sel. 75.

unite in one and the same information for the purpose of determining the title to both offices in one proceeding, and such a misjoinder of parties is fatal on demurrer. Nor is the application of the rule varied by the fact that the duties of the two offices are somewhat similar, or that the incumbents participate in the same duties.[1]

§ 705. In the case of judges of the territorial courts in the various territories of the United States, who are appointed by the president and confirmed by the senate, * 515 it is held that the territory is not a proper party to prosecute an information in the nature of a quo warranto to determine the right to hold such offices, since this would recognize the right of amotion in the territory, without the consent of the general government from which the appointment is derived. The right, therefore, to institute proceedings by a quo-warranto information against such judges rests only with the United States, and a relation or information in the name of a territory is demurrable.[2]

§ 706. In Ohio it is held, where the proceedings are brought against a corporation, that the application for the rule to show cause should be made by the prosecuting officer of the proper county, for and in behalf of the state, and if, in a proper case, this officer refuses to proceed with the application for the rule, the court may order him peremptorily to proceed, or may, in its discretion, direct some other person to continue the proceedings.[3] The same rule applies where the application is made against an individual, and if the proceedings are brought by a private citizen in the first instance, they will be dismissed for irregularity.[4]

§ 707. As regards the necessity of applying for leave of court before filing the information, a distinction is taken

[1] People *v.* De Mill, 15 Mich. 164.

[2] Territory *v.* Lockwood, 8 Wal. 236.

[3] *In re* Bank of Mount Pleasant, 5 Ohio, 249.

[4] State *v.* Moffitt, 5 Ohio, 358. And see as to parties to the proceeding under the New York code of procedure, People *v.* Ryder, 12 N. Y. 433.

between cases where the proceedings are instituted by the attorney general, *ex officio*, and without any relator, and cases where they are brought upon the relation of a private citizen. In the former class of cases, the information is filed as of course, without leave of court, but in the latter class the information can only be filed by leave of court first had and obtained for that purpose, and the application is not granted as of course, but rests in the sound discretion of the court.[1]

§ 708. In Arkansas, where the original writ of quo warranto is still retained, the remedy is treated as one * 516 in behalf of the state, and the writ only issues at the instance of the state, by its attorney general. The proceeding is regarded as an issue between the state and the incumbent of the office in controversy, and not as between two persons claiming a right to the office. The courts of that state, therefore, refuse to grant the writ upon the relation of a private person, or as a remedy in behalf of individual claimants of a disputed office or franchise.[2]

§ 709. It is important to observe, that persons who are otherwise competent relators to institute proceedings by information in the nature of a quo warranto, may by their own conduct be estopped from initiating the proceedings. Where, for example, members of a corporation, either private or municipal, have attended at a corporate election, and participated in the proceedings, and have acquiesced in certain irregularities, which they afterwards seek to make the foundation for proceedings by information against the officers elected, their acquiescence will be deemed a complete bar to allowing an information to be filed upon their relation.[3] And the same doctrine is applied in cases of election to public offices.[4] It is held, however, that the acquiescence of the parties,

[1] State v. Stewart, 32 Mo. 379; State v. Lawrence, 38 Mo. 535; Commonwealth v. Allen, 128 Mass. 308. And see State v. Buskirk, 43 Mo. 111.

[2] Ramsey v. Carhart, 27 Ark. 12. See also State v. McDiarmid, Ib. 176.

[3] State v. Lehre, 7 Rich. 234; King v. Mortlock, 3 T. R. 301.

[4] People v. Waite, 70 Ill. 25; People v. Moore, 73 Ill. 132.

which is relied upon as an estoppel, must be of such a nature as to actually contribute toward bringing about the condition of things complained of, and where they have not acted in bad faith, and their acquiescence or laches has not contributed to the grievance complained of, they may still be competent relators.[1] And where there are several relators on whose information the proceedings have been instituted, some of whom have acquiesced in the irregularity of an election which constitutes the gravamen of the information, their acquiescence does not render one who did not participate therein incompetent as a relator, and the proceedings may be sustained, notwithstanding the incompetency of the others.[2]

[1] King v. Morris, 3 East, 213.

[2] King v. Symmons, 4 T. R. 224; Stephens v. The People, 89 Ill. 337.

CHAPTER XVIII.

OF THE PLEADINGS IN QUO WARRANTO.

§ 710. Ordinary rules of pleading in civil actions applicable.
711. Criminal pleadings followed in Illinois.
712. Prosecutor need not show title; burden of showing title rests on respondent.
713. Sufficiency of allegations.
714. Plea that respondent had been declared elected.
715. Joinder of different pleas and defenses.
716. Respondent should disclaim or justify; what must be shown in justification.
717. Substitution of pleas at common law.
718. Plea of *non usurpavit*, or not guilty.
719. Matter need not be anticipated; when plea treated as confessing usurpation.
720. When plea of charter sufficient.
721. Common-law rule on information for usurping municipal office.
722. Sufficiency of plea as to election proceedings.
723. Allegations as to time of usurpation.
724. Purpose of the information; rules applicable to proceedings against corporations.
725. When plea of not guilty and disclaimer allowed.
726. Rules applicable to board of directors of corporation.
727. Breach of condition; proviso annexed as defeasance to act of incorporation.
728. Plea instead of answer; demurrer carried back to first defective pleading.
729. Facts well pleaded admitted by demurrer; facts should be pleaded and not conclusions of law.
730. Pleadings in Ohio on information against corporation; not changed by code of procedure.

§ 710. The tendency of the courts in modern times, being to regard an information in the nature of a quo warranto in the light of a civil remedy, invoked for the determination of civil rights, although still retaining its criminal form and some

of the incidents of criminal proceedings, the better doctrine now is that the pleadings should conform as * 518 far as possible to the general principles and rules of pleading which govern in ordinary civil actions.[1] And while, as we shall presently see, certain important distinctions are drawn between this and ordinary civil actions as regards the title necessary to be pleaded by the prosecutor, yet in the main the practitioner will be guided by the accustomed rules of pleading applicable to civil actions.

§ 711. The courts of this country, however, have not given a uniform recognition to the doctrine of the preceding section, but have, in some cases, endeavored to establish an analogy between the pleadings applicable to quo-warranto informations and those in criminal proceedings. Thus, in Illinois, where it is held that the modern information is as much a means of criminal prosecution as was the proceeding at common law, it is held that the rules of pleading applicable to criminal indictments should govern in quo-warranto informations, the principal difference being that an indictment is presented by a grand jury, on their oaths, while in the case of informations the court is informed of the facts by the public prosecutor. And the statutes of the state requiring indictments and criminal prosecutions to be carried on in the name and by the authority of the state and to conclude "against the

[1] People *v.* Clark, 4 Cow. 95; State *v.* Commercial Bank, 10 Ohio, 535; State *v.* Kupferle, 44 Mo. 154. And see Attorney General *v.* Michigan State Bank, 2 Doug. 359. See also note to People *v.* Richardson, 4 Cow. 97. But see, *contra*, Donnelly *v.* The People, 11 Ill. 552; People *v.* Mississippi & Atlantic R. Co. 13 Ill. 66; Wight *v.* The People, 15 Ill. 417. In New York by the code of procedure the writ of quo warranto and the information in the nature thereof have been abolished, the relief before attainable in these forms being now had in an ordinary civil action. See as to pleadings in such cases, People *v.* Ryder, 12 N. Y. 433. For a general discussion of the rules of pleading applicable to proceedings in quo warranto, with forms of pleadings, see the learned note of the reporter in People *v.* Richardson, 4 Cow. 97. As to pleadings under the Civil Practice Act of Montana, see Territory *v.* Virginia Road Co. 2 Mont. 96.

peace and dignity," etc., these words should be included in the information, and their omission is fatal.[1]

§ 712. Allusion has been made to an important distinction between pleadings upon quo-warranto informations, * 519 and in civil actions, as to the title necessary to be asserted by the prosecutor. That distinction is, that while in ordinary civil actions the burden rests upon the plaintiff to allege and prove his title to the thing in controversy, the rule is reversed in cases of quo-warranto informations, and the respondent is required to disclose his title to the office or franchise in controversy, and if he fails in any particular to show a complete title, judgment must go against him. In other words, in civil actions plaintiff recovers upon his own title; but in proceedings in quo warranto respondent must show that he has a good title as against the government.[2] The sole issue in proceedings of this nature, insti-

[1] Donnelly *v.* The People, 11 Ill. 552; People *v.* Mississippi & Atlantic R. Co. 13 Ill. 66; Wight *v.* The People, 15 Ill. 417. As to the right to amend the information under the practice in Illinois, see Hinze *v.* The People, 92 Ill. 406.

[2] Rex *v.* Leigh, Burr. 2143; People *v.* Ridgley, 21 Ill. 66. And see People *v.* Miles, 2 Mich. 348; State *v.* Gleason, 12 Fla. 265; People *v.* Mayworm, 5 Mich. 146; Clark *v.* The People, 15 Ill. 217; State *v.* Beecher, 15 Ohio, 723; People *v.* Bartlett, 6 Wend. 422. But in Missouri, it is held that where the material averments of the information are denied by the return or answer, the burden of proof is upon the relator to establish his case. State *v.* Kupferle, 44 Mo. 154. In People *v.* Ridgley, 21 Ill. 67, Mr. Justice BREESE observes: "The usual object of an information of this nature is, to call in question the defendant's title to the office or franchise claimed and exercised by him, because of some alleged defect therein, as for instance, that at the time of the election he was disqualified to be elected; or that the election itself was void or irregular; or that the defendant was not duly elected or not duly appointed; or that he has not been duly sworn in, or otherwise unlawfully admitted; or that he has since become disqualified, and yet presumes to act. A defective title is understood to be, and is, in contemplation of law, the same as no title whatever, and a party exercising an office or franchise of a public nature, is considered as a mere usurper unless he has a good and complete title in every respect. This court has decided that the people are not required to show anything. The entire *onus* is on the defendant, and he must show by his plea, and

tuted to test the right of an incumbent to an office or franchise, being as to the right of the respondent, he can not controvert the right or title of the person alleged * 520 in the information to be entitled to the office, nor can the court adjudicate upon such right, unless it is necessarily involved in the determination of the issue between the people and the respondent.[1] It is therefore unnecessary that the relator should set forth his title to the office, and an information is not demurrable because of an omission to specifically set forth such title, even under a statute authorizing the attorney general in such proceedings to set out in the information the name of the person rightfully entitled to the office, with an averment of his right thereto.[2] And the state is not bound to show a demand for the office, or to establish any fact save such as may be tendered by replication and put in issue by rejoinder or other plea.[3]

§ 713. As regards the question of intrusion into or usurpation of the office, to test which an information is filed, it is regarded as sufficient to allege, generally, that the respondent is in possession of the office without lawful authority.[4] And in case the pleadings are defective in this respect, the defect is one which should be taken advantage of by special demurrer.[5] But when the information is filed by the state upon the relation of the person claiming to be injured by the usurpation, the relator joining with the state, if the pleadings show a good cause of action in favor of the state, a demurrer will not be sustained because it does not

prove, that he has a valid title to the office. He must set out by what warrant he exercises the functions of the office, and must show good authority for so doing, or the people will be entitled to judgment of ouster. Clark *v.* The People, *ex relatione* Crane, 15 Ill. R. 217. The information, however, must allege that the party against whom it is filed, holds and executes some office or franchise, describing it, so that it may be seen the case is within the statute."

[1] People *v.* Miles, 2 Mich. 348.

[2] People *v.* Miles, 2 Mich. 348. But see State *v.* Boal, 46 Mo. 528.

[3] State *v.* McDiarmid, 27 Ark. 176.

[4] People *v.* Woodbury, 14 Cal. 43; People *v.* Abbott, 16 Cal. 358.

[5] People *v.* Woodbury, 14 Cal. 43.

claims all right to the office and denies that he has assumed to exercise its functions, he should allege such facts as, * 523 if true, invest him fully with the legal title; otherwise he is considered as a mere usurper.[1]

§ 717. At common law, if the respondent claimed the office under two distinct titles, one by prescription and the other by charter, but by his plea rested his defense upon his prescriptive right, which was tried and found against him, he could not then resort to his other defense of a charter right.[2] But if he was doubtful whether his title could best be supported under charter or by prescription, he might at any time before trial withdraw the one defense and plead the other.[3] So he might disclaim in part and justify in part. And at any time before trial the court might grant leave to withdraw a plea and plead *de novo* on terms. Or, before joinder in demurrer, the respondent might amend by paying costs.[4]

§ 718. From the nature of the quo-warranto information

not create a vacancy in the office, nor justify the board of supervisors in appointing the defendant. He could have no right to the office, unless the relator was properly removed therefrom. In the proceeding by information in the nature of a quo warranto, the defendant must either disclaim or justify. If he disclaims, the people are at once entitled to judgment. If he justifies, he must set out his title specially. It is not enough to allege generally that he was duly elected or appointed to the office; but he must state particularly how he was elected or appointed. He must show on the face of the plea that he has a valid title to the office. The people are not bound to show anything. The information calls upon the defendant to show by what warrant he exercises the functions of the office, and he must exhibit good authority for so doing, or the people will be entitled to judgment of ouster. Cole on Criminal Informations, 210 to 212; Willcock on Municipal Corporations, 486 to 488; Angell & Ames on Corporations, § 756. The second plea is also too general. It does not state how the office became vacant, nor does it show with sufficient certainty how the defendant was appointed. The third plea is likewise defective. The defendant does not attempt to set out his title. It is no answer to the information, that the relator is not entitled to the office. The defendant must show that he is rightfully in office, or the people are entitled to judgment against him."

[1] State *v.* Harris, 3 Ark. 570.

[2] Rex *v.* Leigh, Burr. 2143.

[3] Rex *v.* Grimes, Burr. 2147.

[4] Com. Dig. Quo Warranto, C. 4.

for the usurpation of an office or franchise, which calls upon the respondent to show by what warrant or authority he exercises the functions of the office, it follows of necessity that *non usurpavit*, or a simple plea of not guilty, does not constitute a sufficient plea, since it discloses no title to the office, which is the very gist of the controversy.[1] But while this principle is conceded, it is held to be competent for the respondent to traverse generally the material allegations tendered by the relator.[2] And when the proceedings are brought to test the right of exercising a corporate franchise, a plea by the corporation alleging, in substance, a right to the exercise of the franchise, and containing negative averments which traverse the allegations contained in the information, is neither a disclaimer nor a plea of *non usurpavit*, and is a valid plea.[3]

§ 719. The general principle of pleading, that it is not necessary to anticipate matter which should more properly come from the other side, applies to the pleadings upon informations in the nature of a quo warranto. When, therefore, the plea or answer anticipates matter which * 524 should more properly be alleged by the prosecutor, so much of it as is faulty in this respect may be stricken out as surplusage.[4] And when the plea tendered by the respondent is utterly bad, and shows no title to the franchise which he is alleged to have usurped, it may be treated as confessing the usurpation, and judgment of ouster may be given thereon.[5]

§ 720. Upon an information to procure the forfeiture of the charter and franchises of a corporation, alleging an unlawful use and usurpation, it is sufficient to plead the charter, without alleging the continued existence of the body corporate down to the time of instituting the proceedings, and

[1] Queen v. Blagden, 10 Mod. Rep. 296. See Commonwealth v. M'Williams, 11 Pa. St. 61.

[2] Commonwealth v. M'Williams, 11 Pa. St 61.

[3] Commonwealth v. Cross Cut R. Co. 53 Pa. St. 62.

[4] Attorney General v. Michigan State Bank, 2 Doug. 359.

[5] Rex v. Philips, Stra. 394.

without pleading certain facts which are alleged as an estoppel of the right of the state to insist upon a forfeiture of the franchise, since the plea of the charter constitutes a sufficient *prima facie* defense to the information. And the corporate charter being shown, its continued existence down to the time of filing the information will be presumed.[1]

§ 721. At common law, upon proceedings by information for the usurpation of a municipal office, it was not deemed essential to allege specially whether the office was by charter or prescription. If it it was shown to be an office concerning the public, this was held sufficient as against a usurper, and when this was admitted by demurrer, judgment would go for the crown.[2] Amd when the proceedings are brought against a municipal corporation, charging it with exercising franchises to which it is not entitled, the inquiry is limited to the matters charged in the information; and, in such case, matter which is set up by way of plea is only material in so far as it shows a warrant in law for the exercise of the franchise in question.[3]

§ 722. When the information is filed to test the right of an incumbent of an elective office to exercise its functions, it is sufficient if the plea shows the authority for holding the election, the holding of the election, and that respondent received the largest number of votes, without averring that he received the largest number of votes as appeared by the return of the canvassers, such an averment being regarded as immaterial.[4] Nor is it necessary to allege a strict fulfillment on the part of the board of canvassers of elec-
* 525 tion returns of all their duties, since the court may go behind their proceedings, their certificate of election being only *prima facie* evidence of title to the office.[5]

§ 723. As regards the time when the usurpation occurred,

[1] Attorney General *v.* Michigan State Bank, 2 Doug. 359.

[2] King *v.* Boyles, Ld. Raym. 1559.

[3] State *v.* City of Cincinnati, 23 Ohio St. 445.

[4] People *v.* Van Cleve, 1 Mich. 362.

[5] People *v.* Van Cleve, 1 Mich. 362.

it is held to be unnecessary to specify in the information any particular day as that on which the respondent was guilty of a usurpation of the office in question. And when the allegation as to time is, that for the space of two days last past respondent has usurped the office it will be construed to refer to the two days next preceding the filing of the information, and the period of the alleged usurpation is thus fixed with sufficient certainty. Nor is it essential that the time when the information is presented to the court should appear in the caption thereof.[1]

§ 724. The fundamental purpose of the information is to inform the court as to the questions of fact upon which the proceedings are based, in order that it may properly apply the law to those facts. And when the information is filed against an incorporated company for the purpose of obtaining a forfeiture of its franchise, it should allege under what law the corporation exists, and if deficient in this respect, the information is demurrable.[2] So, when the proceedings are instituted against a corporate body to compel it to show by what warrant it exercises its corporate franchise, it is proper for the respondent in its return to recite the several legislative enactments upon which it relies as constituting it a legal corporation, and such a return will be held good on demurrer.[3] And upon an information against an incorporated company, by its corporate name, to procure a forfeiture of its franchise, charging the usurpation generally, if the respondent pleads its act of incorporation, under which it justifies, it is proper for the prosecution to reply, setting up specially the causes of forfeiture.[4] And when an information is brought

[1] People v. Miller, 15 Mich. 354.

[2] Danville & White Lick Plank-road Co. v. The State, 16 Ind. 456.

[3] State v. Mississippi, Ouachita & Red River R. Co. 20 Ark. 495.

[4] People v. Bank of Niagara, 6 Cow. 196. See also as to pleading in such case, People v. Bank of Washington, 6 Cow. 211; People v. Kankakee River Improvement Co. 103 Ill. 491. And see as to pleadings upon an information for a forfeiture of the franchise of a municipal corporation, King v. City of London, 3 Harg. State Trials, 545.

against a railway company to procure the forfeiture of its franchises, it is proper to join causes of forfeiture at common law with those created by statute.[1]

§ 725. Where the information charges respondents * 526 as individuals with having usurped and exercised the franchise of a corporation, without authority of law, and the respondents have the right under the statutes of the state to plead not guilty to the information, they may, with the plea of not guilty, also plead a disclaimer of any right to use and enjoy the franchise in question, the two grounds of defense not being inconsistent as regards the individual capacity in which respondents are acting. And in such case the state is not entitled to judgment upon the disclaimer, since under the plea of the general issue, it devolves upon the prosecution to establish by proof the facts alleged in the information.[2]

§ 726. In proceedings by information to test the right of a board of directors of a corporation to hold their office, it is not sufficient that they plead generally that they were elected, but they should also set out the particulars of their election. Nor can respondents in such proceedings rely upon two distinct titles, but they may be put to their election under which of the two they will defend, and a plea alleging two distinct and separate elections, by virtue of which they claim to hold their office, is bad for duplicity.[3]

§ 727. Great strictness is required in assigning a breach of a condition for the purpose of forfeiting a corporate franchise, and while the breach need not, perhaps, in all cases be stated in the very words of the condition, yet it should at least be stated according to its legal effect and spirit.[4] But where an association has been created a body politic and corporate *in presenti*, with a proviso annexed to the act of incor-

[1] State *v.* Milwaukee, L. S. & W. R. Co. 45 Wis. 579.

[2] State *v.* Brown, 34 Miss. 688.

[3] Commonwealth *v.* Gill, 3 Whart. 228.

[4] People *v.* Manhattan Company, 9 Wend. 351.

poration, not as a condition precedent, but as a defeasance, being fully created and organized in the first instance, its continued existence is presumed until the contrary is shown. It is not necessary, therefore, for such a cor- * 527 poration, in answer to an information for a forfeiture of its franchise, to plead the condition of defeasance and allege its performance, even though the time within which it was to be performed has long since elapsed.[1] And in general it would seem to be sufficient to aver in the plea the incorporation of the respondent as a body politic, without

[1] People *v.* Manhattan Company, 9 Wend. 351. This was a quo-warranto information to procure a forfeiture of respondent's charter, which had been granted upon the following condition: "Provided, that said company shall, within ten years from the passing of this act, furnish and continue a supply of pure and wholesome water, sufficient for the use of all such citizens dwelling in said city as shall agree to take it on the terms to be demanded by the said company; in default whereof the corporation shall be dissolved." Mr. Justice SUTHERLAND, for the court, says: "I believe it was not contended, and it certainly can not be successfully, that a compliance with the proviso in this case was a condition precedent to the original rightful existence and organization of the defendants as a corporation. The first enacting clause of the act creates and declares the individuals therein named, and their associates, a body politic and corporate *in presenti*, while, by the very terms of the proviso, they were to have ten years thereafter to furnish the water. Neither their existence nor their general powers as a corporation were in abeyance during that period. They had a right immediately to exercise any of the powers conferred upon them by their charter. The proviso was strictly a defeasance, and not a condition precedent; and it was not necessary, therefore, for the defendants to notice it in their plea. Perhaps the counsel meant to contend that as the defendants were called upon by the information to show by what authority they now claim and exercise the franchise of being a corporation, they were bound to aver everything necessary to show a present right; and as the period limited by the proviso had long before elapsed, it was incumbent upon them, among other things, to show that they had performed that condition. It seems to me to be a satisfactory answer to this argument to say that the corporation, having been shown to have been legally created and organized, is in judgment of law supposed to continue to exist until the contrary is shown, and to have performed all its duties, and among others, the duty of supplying the city of New York with pure and wholesome water."

averring a compliance with all the requirements of its charter, or alleging affirmatively a performance of the necessary acts to complete the corporate organization, leaving the prosecution to reply any matter which would show a failure on the part of the respondent to comply with its act of incorporation.[1]

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§ 728. In Illinois, it is held to be the proper course for the respondent in the information to plead thereto instead of answering. If, however, he has filed an answer instead of a plea, the technical distinctions between the two may be disregarded and the answer may be treated as a plea for the purposes of the case, and there may be a demurrer to such answer and joinder in demurrer, as in ordinary cases.[2] It is to be observed, also, that the familiar principle of pleading that a demurrer reaches back to the first defective pleading on either side applies to quo-warranto informations. When, therefore, the information is fatally defective, upon a demurrer to respondent's plea or return the court need not inquire into the validity of the plea, and the demurrer may be carried back and sustained as a demurrer to the information.[3] And it is open to the respondent upon demurrer to his answer, when no issue of fact has been formed, and no trial had upon the merits, to raise the question of whether resort has been had to the proper remedy, since an answer is not a waiver of the right to question the propriety of the relief sought.[4]

§ 729. By analogy to the principle governing the pleadings in ordinary actions at law, all the facts which are well pleaded in answer or return to the information, are admitted by demurrer thereto. The question upon such demurrer then is, whether the material averments in the information

[1] People v. Rensselaer & Saratoga R. Co. 15 Wend. 113.

[2] People v. Percells, 3 Gilm. 59.

[3] People v. Mississippi & Atlantic R. Co. 13 Ill. 66; State v. North, 42 Conn. 79; Elam v. The State, 75 Ind. 518; State v. Commissioners of Pawnee Co. 12 Kan. 426. See also State v. Commissioners of Ford Co. 12 Kan. 441.

[4] People v. Whitcomb, 55 Ill. 172.

are answered, and if not the demurrer will be sustained and respondent will have leave to amend his answer.[1] And when it is alleged in the information that respondent holds and exercises his office without legal warrant or qualification, and by his answer he avers a legal appointment and qualification, and an entry upon the duties of the office, and also alleges, as a legal conclusion, that he has ever since held and enjoyed the office, as he had a legal right to do, such answer is not sufficient, since it is incumbent upon the respond- * 529 ent to set up all the facts necessary to constitute a good and sufficient title to the office.[2]

§ 730. In Ohio, the doctrine was early established that the prosecutor in proceedings upon a quo-warranto information for the forfeiture of a corporate franchise might pursue either of two courses: he might disclose in the information the specific ground of forfeiture relied upon, or he might, in general terms, charge the respondent with exercising certain franchises without authority, and call upon it to show by what warrant such powers were claimed. The plea should then deny the facts charged, or set forth the authority relied upon, as the case might be, and the replication might then allege the acts upon which the prosecutor relied as working a forfeiture. These, again, might be denied, or a demurrer might be filed, following substantially the same course as in ordinary pleadings at common law. In this manner the authority to exercise the franchise in question was disclosed by the party claiming the right to its exercise, and the acts alleged to be unauthorized were pleaded by the party complaining thereof.[3] And it is held that the rules of pleading established by the code of procedure in Ohio are not applicable to proceedings in the nature of quo warranto, and that the pleadings in such cases are still governed by the rules prevailing at the adoption of the code.[4]

[1] State v. Beecher, 15 Ohio, 723.
[2] State v. Beecher, 15 Ohio, 723.
[3] State v. Commercial Bank, 10 Ohio, 535.
[4] State v. McDaniel, 22 Ohio St. 354.

CHAPTER XIX.

OF THE PRACTICE IN QUO WARRANTO.

§ 731 Practice on rule to show cause why information should not be allowed; rule not always granted.
731 *a*. Practice in various states.
732. Service of rule; discretion as to granting rule.
733. Requisites of affidavits; should be sworn positively.
734. Distinction as to allegations of title and of usurpation.
735. Process at common law upon the original writ and upon the information.
736. Jurisdiction of the person, how acquired.
737. Amendments freely allowed.
738. Rule to show cause may be opposed by affidavits.
739. Effect of a default the same as in ordinary civil actions.
740. Of the venue where jury trial is had.
741. New trials allowed as in civil actions.
742. Costs under statute of Anne.
743. Costs in New York.
744. Courts averse to second application for same defect in title.

§ 731. The usual practice in obtaining leave * 530 to file an information in the nature of a quo warranto, at the suggestion of a private relator, is, unless otherwise provided by statute or local rules of practice, to present to the court an application or petition verified by affidavit, upon which a rule issues requiring the respondent to show cause why the information should not be filed against him, and unless he shows such cause on the return as to put his right beyond dispute, the rule for the information will be made absolute, in order that the question concerning the right may be properly determined.[1] And it has been held that the

[1] United States *v.* Lockwood, 1 Pinney's Wis. 359; Commonwealth *v.* Jones, 12 Pa. St. 365; *In re* Bank of Mount Pleasant, 5 Ohio, 249;

allowing an information upon the filing of a sugges- * 531
tion, without a rule to show cause, constitutes sufficient ground for sustaining a motion to quash.[1] The practice, however, of proceeding in the first instance by the rule to show cause is by no means uniform, and where the proceedings are instituted for the usurpation of an office claimed by the relator as a matter of right, it has been held to be immaterial whether the relator proceeds in the first instance by the rule *nisi*, or asks leave to file the information. And the latter course is said to be equally proper where notice of the application is given the respondent, and where sufficient time is allowed to enable him to prepare affidavits in opposition to the case presented.[2] So it has been held that the rule to show cause is a matter of form rather than of substance, and that if the respondent has a preliminary hearing, as upon a motion to quash, the omission of the rule is not fatal.[3] Under the English practice, the prosecutor was obliged by rule of court, to specify in the rule to show cause all objections which he intended to urge against the title of respondent, and no objection not thus specified could be raised on the pleadings without leave of court.[4]

§ 731 *a*. In Illinois, it is regarded as the proper practice for the public prosecutor to present a motion for leave to file the information, such motion being based upon an affidavit, and a rule *nisi* may then issue to the respondent to show cause why the information should not be filed, and the respondent may answer such rule upon counter affidavits.[5] In Pennsylvania, as in New Jersey, when the state through its attorney general institutes the action, it is entitled to proceed without a rule to show cause and without leave to file the

See also People *v.* Waite, 6 Chicago Legal News, 175, 70 Ill. 25.

[1] Commonwealth *v.* Jones, 12 Pa. St. 365.

[2] State *v.* Burnett, 2 Ala. 140.

[3] Murphy *v.* Farmers Bank, 20 Pa. St. 415, overruling as to this point, Commonwealth *v.* Jones, 12 Pa. St. 365.

[4] Reg. Gen. Hil. Term, 7 & 8 Geo. IV.

[5] People *v.* Waite, 6 Chicago Legal News, 175, 70 Ill. 25.

information, as is required in the case of a private relator.[1] In Vermont, the practice is for the relator to apply for a rule to show cause why the information should not be filed, and this application may be granted with or without notice, and as a matter of course if proper ground is shown. But the allowance of the rule determines no question of right, either as to subject-matter or as to procedure, all such questions remaining to be determined upon the return.[2] In Ohio, under a statute authorizing the proceedings by any person in his own behalf who claims title to a public office unlawfully held by another, leave to file the petition is unnecessary, since the relator sues in his private right.[3]

§ 732. It is to be observed with reference to the nature of the rule to show cause, that it is not regarded as a writ issuing out of the court and directed to an officer, requiring his official return thereto, but it is merely a rule of court which may be served by any person competent to transact business, and the time and manner of such service may be made to appear to the satisfaction of the court by affidavit of the person making the service.[4] And it is held that the court is vested with a certain degree of discretion as to whether the rule shall be granted, or leave be given to file the information in the first instance. And where respondents' whole case touching the subject of the application had been disclosed by their answer in a chancery proceeding, * 532 and by the answers of other persons favorable to them, the court upon an examination of such answers granted a rule for the information in the first instance.[5]

§ 733. The affidavits upon which the application is based should contain positive allegations of the facts on which the

[1] Commonwealth v. Walter, 83 Pa. St. 105; Attorney General v. Delaware & B. B. R. Co. 38 N. J. L. 282.

[2] State v. Smith, 48 Vt. 14. And see S. C. 48 Vt. 266.

[3] State v. Thompson, 34 Ohio St. 365.

[4] United States v. Lockwood, 1 Pinney's Wis. 359.

[5] People v. Kip, cited in note to People v. Richardson, 4 Cow. 106. And see this note as to the general practice and procedure on quo-warranto informations.

prosecutor seeks to assail the title of the respondent, and the courts are averse to granting leave to file the information upon affidavits which rest only upon the belief of the affiant.[1] And where the affidavit upon which a rule *nisi* was obtained against the mayor of a municipality, only alleged that the relator did not believe the mayor was duly sworn into his office, it was held insufficient and the rule was discharged. Nor, in such case, will the court entertain an additional affidavit upon the hearing, for the purpose of contradicting an entry upon the corporate records, showing that the mayor was duly sworn.[2] So where the application for the rule is based upon an immemorial custom to elect in a particular manner, it is necessary to state in the affidavits the existence of such custom, and not merely to allege facts from whence the conclusion might be drawn.[3]

§ 734. Notwithstanding the rule as stated in the preceding section is well established, its application would seem to be confined to allegations of title, and not those of usurpation. And it is held to be unnecessary that the affidavits upon which the rule to show cause issues should be sworn positively, as to allegations of the usurpation, and that it is sufficient if they be sworn upon the information and belief of the relator. And when no answer has been made to these allegations by the respondent, who has had full opportunity of denial, the rule will be made absolute, sufficient facts appearing to put the matter in course of inquiry.[4] * 533 The distinction recognized is, as to whether the matter of hearsay and belief goes to the validity of the title to the office in question, or merely to the fact of usurpation.[5] And if the affidavits in support of the rule for the information omit a material fact pertinent to the subject of inquiry, and

[1] See King *v.* Newling, 3 T. R. 310; King *v.* Lane, 5 Barn. & Ald. 488.

[2] King *v.* Newling, 3 T. R. 310.

[3] King *v.* Lane, 5 Barn. & Ald. 488.

[4] King *v.* Harwood, 2 East, 177; King *v.* Slythe, 6 B. & C. 240.

[5] King *v.* Slythe, 6 B. & C. 240.

which is disclosed in an affidavit filed by the other side, the latter may be read by the prosecutor in support of the rule.[1]

§ 735. The respondent must in all cases be brought into court by due and regular process, and it is irregular to proceed against him merely by a rule to appear.[2] At common law, the first process upon the ancient writ of quo warranto was a summons, and upon default of appearance the liberties and franchises in controversy were seized. Upon the quo-warranto information, however, a different practice prevailed, and the first process issued was a *venire facias* or subpœna, which was followed by a *distringas* if the former process failed to procure an appearance.[3] And the information being in the nature of a personal action, there could not be a seizure of the franchise upon the *venire facias*, but only after the *distringas* had issued, although it would seem to have been otherwise upon the writ of quo warranto.[4]

§ 736. An appearance by respondent upon the rule to show cause is not an appearance upon the information, and he is not thereby in court for the purposes of the information. The object of the rule being merely to obtain leave to institute the action, the respondent is not in court until brought there by due process.[5] And when the respondent is notified of the application for leave to file the information, but fails to appear in pursuance of the notice, and leave is thereupon granted to file the information, without further process, and a rule to plead is entered, a copy of which is served on respondent, who neglects to plead, the court acquires no jurisdiction to render judgment of ouster, since the respondent has never been formally brought into court or served with process. Even though he be informally notified of the pendency of the proceedings

[1] King *v.* Mein, 3 T. R. 596.

[2] People *v.* Richardson, 4 Cow. 97. See also Hambleton *v.* The People, 44 Ill. 458; Commonwealth *v.* Sprenger, 5 Binn. 353.

[3] Rex *v.* Trinity House, Sid. 86; Rex *v.* Mayor of Hertford, Ld. Raym. 426; Attorney General *v.* Delaware & B. B. R. Co. 38 N. J. L. 283.

[4] Anon. 3 Salk. 104.

[5] Commonwealth *v.* Sprenger, 5 Binn. 353.

before rendition of the final judgment, the court is still without jurisdiction, since this can only be acquired by service of process in the name of the people, or by a voluntary appearance.[1] If, however, the court grants leave to file the information, upon a petition praying such leave, and respondent in open court waives the filing of the information, and the cause proceeds to hearing and judgment upon the merits, respondent will not be allowed upon writ of error to object that no information was filed.[2]

§ 737. Although the information in the nature of a quo warranto is still a criminal proceeding in form, * 534 yet unlike criminal pleadings, it may be amended at any time before trial, or even upon the trial. Regarding the proceeding as substantially a civil remedy, for the protection of a civil right, the same principles are held applicable which govern in the allowance of amendments in ordinary actions, and the courts incline to a liberal allowance of amendments upon proper cause shown and when they are necessary in furtherance of substantial justice.[3] It follows necessarily from the liberal practice in allowing amendments, that any objections to the proceedings which do not touch substantial questions of right, but merely go to matters of form, and which may be cured by amendment, do not furnish sufficient ground for sustaining a motion to quash.[4] But when an information is filed by the attorney general against the directors of a corporation, and he afterwards seeks to discontinue the proceedings, private persons, having no other interest in the matter than that which is common to every citizen, can not be substituted by amendment as relators in place of the attorney general.[5]

§ 738. It is regarded as proper practice for the respond-

[1] Hambleton *v.* The People, 44 Ill. 458.

[2] Bland and Giles County Judge Case, 33 Grat. 443.

[3] Commonwealth *v.* Gill, 3 Whart. 228; State *v.* Gleason, 12 Fla. 190; Commonwealth *v.* Commercial Bank, 28 Pa. St. 383.

[4] Commonwealth *v.* Commercial Bank, 28 Pa. St. 383.

[5] Commonwealth *v.* Dillon, 81½ Pa. St. 41.

ent to answer the rule to show cause by counter affidavits, in which he sets up the grounds of his opposition to making the rule absolute. If these affidavits present satisfactory reasons to the court why leave should not be given to file the information, the rule will be discharged without further proceedings.[1]

§ 739. The information in the nature of a quo warranto being in effect substantially a civil remedy, although * 535 criminal in form, the effect of a default is the same as in ordinary civil actions. When, therefore, the respondent is in default in answering or pleading to the information, he is regarded as confessing all its allegations which are well pleaded, and the court may thereupon proceed to judgment of ouster forthwith. But in a case of great public importance, involving the title to the chief executive office of a state, which is claimed by the relator, the court may in its discretion require satisfactory evidence of the relator's election to the office, notwithstanding the respondent is in default.[2]

§ 740. It is frequently necessary that issues of fact arising in proceedings upon quo-warranto informations should be sent to a jury for trial, and in some of the states this is provided for by statute. As to the question of the venue in such cases, it would seem, in the absence of any statutory provisions upon that point, that if the case be one of an office which is local in its nature and functions, such as that of sheriff of a county, the proceeding should be treated as a local one, and the issue sent for trial to the particular county to which the office pertains, unless such a showing is made as to warrant a change of venue.[3]

§ 741. While it seems to have formerly been matter of doubt whether a new trial could be had upon an information, after an issue had been referred to a jury trial, the rule may

[1] People v. Waite, 6 Chicago Legal News, 175, 70 Ill. 25

[2] Attorney General v. Barstow, 4 Wis. 567.

[3] People v. Cicott, 15 Mich. 326.

now be regarded as definitely established, that a trial upon a quo-warranto information occupies in this regard the same footing as a trial in ordinary civil actions, and in the absence of any statute upon the subject the practice will be governed by the common-law rules applicable to the subject of new trials.[1] And the information being now regarded as in the nature of a civil action, it is proper to grant a new trial, as in ordinary cases, upon the ground that the verdict is contrary to the weight of evidence.[2] So when an issue of fact presented by the pleadings is referred to a jury for trial, and a special verdict is found as to some of the facts in * 536 issue, but the verdict is silent as to other and important questions presented, the court may treat the proceeding as having resulted in a mis-trial, and direct the cause to be tried *de novo*.[3]

§ 742. The statute of Anne authorized the recovery of costs by the successful party, and in cases of municipal offices and franchises, which were the only cases covered by this statute, provided that the court might give judgment for the costs of the prosecution, if the relator were successful, or for the costs expended by the respondent, if he prevailed in the action.[4] This statute seems to have been generally followed in this respect in most of the states, either by direct legislation, or by recognition of the courts. Where, however, the information is filed to test the right to exercise the franchise of a municipal corporation, and the officers of the corporation filé a disclaimer of any purpose or intention to exercise the functions of the offices to which they were elected, no costs will be allowed against them.[5]

§ 743. In New York, the code of procedure has abolished both the common-law writ of quo warranto and the information in the nature thereof, and has substituted a civil action

[1] People *v.* Sackett, 14 Mich. 243.
[2] King *v.* Francis, 2 T. R. 484.
[3] People *v.* Doesburg, 17 Mich. 185.
[4] 9 Ann. Ch. 20, Sec. V., Appendix A, *post*.
[5] State *v.* Bradford, 32 Vt. 50.

in their stead. The courts of that state, however, are still governed largely by common-law rules as to the granting of costs in proceedings under this statutory remedy. And when judgment of ouster is rendered against the respondent, costs will be allowed against him, even though the relator may have failed to establish his own title to the office.[1] And under the statutes of Wisconsin, when the respondent is found guilty of usurping or unlawfully holding the office in question, the relator is entitled to his costs, even though he may not have established his own title to the office.[2]

§ 744. When the application for leave to file an information has once been made and refused, it will not again be granted against the same officer for the same alleged defect in his title, upon affidavits impeaching those filed in opposition to the former application, since the courts will not encourage parties in coming before them with an imperfect case in the first instance and supplying its defects upon the second application by alleged inconsistencies in the opposing affidavits.[3]

[1] People v. Clute, 52 N. Y. 576.
[2] State v. Jenkins, 46 Wis. 616.
[3] King v. Orde, 8 Ad. & E. 420, note.

CHAPTER XX.

OF THE JUDGMENT IN QUO WARRANTO.

§ 745. Nature of the judgment at common law.
746. Conclusive effect of judgment upon the original writ.
747. *Capiatur pro fine;* judgment upon one of several issues.
748. Judgment of ouster conclusive as to prior election; only conclusive upon parties.
749. Judgment good in part and bad in part.
750. Judgment of ouster neither creates nor destroys rights.
751. Costs under statute of Anne.
752. Judgment of ouster against corporation.
753. Distinction between seizure of franchises and dissolution of corporation.
754. Ouster not dependent upon claim of right; may be allowed where usurpation has ceased.
755. Goods and effects of corporation not forfeited to state; state may waive forfeiture.
756. Effect of judgment of ouster upon the officer; bars mandamus to restore him.
757. Judgment does not declare vacancy; relator's right need not be determined.
758. Discretion as to fine; omission not assignable for error.
759. Want of leave to file information; judgment on demurrer.
760. Return of canvassers not conclusive; commission not conclusive.
761. Refusal to allow information, when a final judgment; refusal to allow supersedeas.

§ 745. At common law, the judgment upon the ancient writ of quo warranto, if for the respondent, was * 537 that he be allowed his office or franchise. And in case of judgment for the king for a usurpation of the franchise, or for its mis-user, or non-user, a judgment of seizure into the king's hands was rendered, if the franchise was of such a nature as to subsist in the hands of the crown; if not of such a nature, there was merely judgment of ouster for the purpose of dis-

possessing the party. In case of judgment for a seizure of the franchises into the king's hands, all franchises incident and subordinate thereto, and held by the same grant, * 538 were also forfeited. If the respondent disclaimed, judgment was rendered immediately for the crown. And upon the other hand, if the attorney general confessed the respondent's plea, judgment was rendered for the allowance of the franchises. Such confession, however, did not conclude either the king or the court as to matters of law, but was only conclusive as to questions of fact, and even as to such questions it would seem to have been conclusive upon the crown only in matters of private concern, wherein the public had no interest.[1]

§ 746. The original writ of quo warranto being in the nature of a writ of right, judgment thereon was regarded as final and conclusive upon all parties, including even the crown.[2] And it was doubtless due to this fact, as well as to the dilatory nature of the process, that its place was gradually usurped by the information in the nature of a quo warranto, the judgment in which is less decisive, being ordinarily a mere judgment of ouster with a nominal fine. This distinction between the nature of the judgment applicable to the two remedies was early recognized by the court of kings bench, which held that the appropriate judgment upon an information brought to test the right to exercise a corporate franchise, was, if the respondents were found guilty, that they be fined and ousted from the particular franchise, thus distinguishing the remedy from the ancient writ, on which the judgment was that the franchise be seized into the king's hands.[3] In the celebrated case of the city of London, however, which was that of an information for the mis-user and usurpation of corporate franchises, judgment was rendered that the liberties, privileges

[1] Com. Dig. Quo Warranto, C. 5. And see 3 Black. Com. 263.

[2] Rex v. Trinity House, Sid. 86.

[3] Rex v. Mayor of Hertford, 1 Ld. Raym. 426. And see 3 Black. Com. 263.

and franchises of the corporation be seized into the hands of the king.[1]

§ 747. At common law, upon judgment by *nil dicit*, on a quo-warranto information, a *capiatur pro fine* was issued as an interlocutory process for the purpose of bringing the respondent before the court, preparatory to rendering final judgment in the cause. Formal judgment of ouster was then rendered by the court, ousting respondent from * 539 his office, although the fine might, under acts of parliament, be pardoned to the offender.[2] And where it was found that the respondent had been guilty of usurpation, judgment of ouster was rendered against him, even though other important issues were found in his favor. Thus, upon an information to show by what authority the respondent exercised the office of mayor, where two issues were presented and tried, the first as to the election, which was found in his favor, and the second as to the swearing in, which was found against him, judgment of ouster was rendered, since the acting as mayor without being sworn was regarded as a usurpation for which the respondent should be punished, even though he might have been entitled to a mandamus to swear him into the office.[3] And since the crown was not obliged to show any title, the respondent being required to show a complete title in himself as against the crown, if he failed in any one material issue, judgment was given against him.[4] But where

[1] King *v.* City of London, 3 Harg. State Trials, 545.

[2] Queen *v.* Tyrrill, 11 Mod. Rep. 235.

[3] *In re* Mayor of Penryn, Stra. 582. And the same principle is recognized in King *v.* Reeks, Ld. Raym. 1445, where it is said that the judgment of the court in the case of the Mayor of Penryn was affirmed on error to the house of lords.

[4] Rex *v.* Leigh, Burr. 2143. The respondent in this case had claimed the office of Mayor under two titles, one by prescription, the other under a charter, but by his plea, he had based his defense upon his claim under the prescriptive right, which was tried and found against him. The reporter says: "Lord MANSFIELD asked if they could cite any case where judgment had been refused to the crown upon an information in the nature of a quo warranto, where the defendant failed

the respondent confessed the usurpation for a part
* 540 only of the time alleged, insisting upon an election as
to the residue, judgment of ouster was refused, such a case being distinguishable upon principle from that of usurpation for the entire time charged in the information.[1]

§ 748. The effect of an absolute judgment of ouster is conclusive upon the person against whom the judgment is rendered, and is a complete bar to his again asserting title to the office or franchise by virtue of an election before the original proceedings. Where, therefore, upon an information in the nature of a quo warranto for exercising the office of alderman, the respondent disclaims all title to the office, thereby admitting his usurpation, and judgment of ouster is rendered against him upon a second information for exercising the functions of the same office, he is concluded from asserting a title under an election held prior to the filing of the former information under which he claims to have been sworn into the office.

in the title he had set up. And it seemed acknowledged that there was none. At least none were mentioned. Whereupon his lordship proceeded to observe that in civil cases, if the plaintiff has no cause of action he can not have judgment. But this manner of proceeding is quite different. For, if the defendant has usurped the franchise without a title, the king must have judgment. The defendant, therefore, is obliged to show a title, and the king has no need to traverse anything but the title set up. If any one material issue is found for the crown the crown must have judgment." Mr. Justice YATES adds: "If the plea contains no title against the crown, there must be judgment for the crown. In civil actions the plaintiff must recover upon his own title, in cases of information in nature of quo warranto for usurpations upon the rights of the crown, the defendant must show that he has a good title against the crown. * * * The defendant in quo warranto is called upon to show his title; to show quo warranto he claims the franchise. He accordingly shows his title. The crown are only to answer this particular claim. He must at once show a complete title. If he fails in it, or in any chain of it, judgment must be given against him. Here the defendant has set up a particular title; this title upon which he grounds his claim to the franchise is found against him. He can not now depart from it. Therefore the crown is here entitled to judgment."

[1] Rex *v.* Biddle, Stra. 952; S. C. *sub. nom.* King *v.* Taylor, 7 Mod. 169.

Nor will the respondent, in such case, be permitted to rely upon a peremptory mandamus, by virtue of which he was sworn into the office under such former election, since a mandamus to swear in an officer can not, of itself, confer title.[1] It is, however, to be borne in mind that the general rule that judgments are conclusive only upon parties to the record or their privies applies to proceedings in quo warranto, as in ordinary cases. A judgment of ouster, therefore, in no manner concludes the rights of one who was not a party to the action, and who does not derive his title to the office in question from any party to the action.[2]

§ 749. It would seem that the judgment may be good in part and bad in part, and in such case it will be affirmed as to the part held good, and reversed as to the residue. Thus, where judgment of ouster was rendered, together with judgment for costs under the statute of Anne, and the court was of opinion that the case did not fall within the statute as to costs, that part of the judgment was reversed, and the judgment of ouster was sustained, being held good as * 541 a common-law judgment.[3]

§ 750. In considering the effect of a judgment of ouster upon a quo-warranto information brought to determine the title to a public office, it is to be borne in mind that the judgment itself creates no right, but is merely declaratory of rights already existing, the court being the instrument or medium through which the rights created by law are ascertained and definitely fixed. The judgment, therefore, neither creates a right in the successful party, nor destroys one which formerly belonged to the party ousted. Nor does the judgment of ouster affect the nature or functions of the office itself, and these continue unchanged, whether the original incumbent remains, or whether another is substituted in his place.[4]

[1] King v. Clarke, 2 East, 75.
[2] People v. Murray, 73 N. Y. 535.
[3] Rex v. Williams, Burr. 402.
[4] Attorney General v. Barstow, 4 Wis. 567. This was an information in the nature of a quo warranto to test the title to the office of governor of the state. It was objected

§ 751. The statute of Anne extending and regulat-
* 542 ing the use of quo-warranto informations in cases affecting municipal offices and franchises, expressly enacted that in case any person should be found guilty of usurping or intruding into such offices or franchises, judgment of ouster should be given as well as a fine for such usurpation or intrusion, together with costs, and if judgment should be given for respondent, it should also carry costs.[1] But it is held that on rendering judgment upon the common-

that a removal of the person filling the office of governor, and the substitution of the relator in his stead, would interfere with the executive department, for the reason that the person substituted would be the governor of the court, elected or created by the court. Upon this point WHITON, C. J., for the court, says, p. 659: "As the case now appears upon the record, the respondent has no legal right to the office, and the relator has a perfect right to it, by virtue of the clause of the constitution above referred to. If the facts should remain unchanged, a judgment of ouster in this court against the respondent, and a judgment establishing the right of the relator, would not create a right in the latter, or destroy one which belongs to the former. Their rights are fixed by the constitution, and the court, if it has jurisdiction of this proceeding, is the mere instrument provided by the constitution to ascertain and enforce their rights as fixed by that instrument. Its office is the same as in all controversies between party and party; not to create rights, but to ascertain and enforce them. The same argument would apply with equal force to an information in the nature of a quo warranto against a sheriff or any other officer. We do not think it well founded. It was contended further by the counsel for the respondent, that a judgment of ouster in this court against the respondent and a judgment in favor of the relator, would interfere with the executive department, because it would transfer the office of the governor from the former to the latter. We do not think this is a correct statement of the effect of a judgment of ouster in cases of this description. It seems clear to us, that a judgment of ouster against the incumbent of an office in no way affects the office. Its duties are the same, whether the original incumbent remains in it, or whether another is substituted in his place. If a removal from an office by a judgment of ouster against the incumbent would affect the office itself, so also would a removal by the death of the incumbent, or his resignation. In all these cases we think the office is in no way affected. It remains as it was before the removal."

[1] 9 Anne, Ch. 20, Sec. 5. See Appendix, A.

law information, if there be no relator the court has no power to give judgment for costs against the respondents.[1]

§ 752. Following the common-law rule, as well as the statute of Anne, the judgment usually rendered upon quo-warranto informations is that of ouster, if the respondent be found guilty of a usurpation of the franchise, with sometimes a nominal fine.[2] And where upon an information to test the right of a corporation to exercise certain corporate franchises not conferred by its charter, if the title set up by way of defense be incomplete, the people are entitled to judgment of ouster.[3] And the effect of judgment of ouster against a corporation is to exclude it from the right to exercise any of its franchises or privileges, and no grantee or licensee of the corporation thereafter can justify his action under its rights or franchises.[4]

§ 753. A clear distinction is recognized by the court of kings bench between a judgment of seizure, by which the franchise is seized into the king's hands, and a judgment dissolving the corporation itself. And where, upon an information against the officers and members of a municipal corporation, judgment is rendered that the liberties of the corporation be seized into the hands of the king, the judgment does not have the effect of dissolving the corporation or ousting the members from their corporate franchise. Such a judgment neither extinguishes nor dissolves the body * 543 corporate, and the mere seizure by the crown of certain franchises and liberties which it has usurped, does not extinguish the corporate entity.[5] Substantially the same distinc-

[1] Commonwealth *v.* Woelper, 3 S. & R. 52.

[2] See State *v.* Brown, 5 R. I. 1.

[3] People *v.* Utica Insurance Co. 15 Johns. Rep. 357.

[4] Campbell *v.* Talbot, 132 Mass. 174.

[5] Smith's case, 4 Mod. Rep. 53. *Per curia*: "A corporation may be dissolved, for it is created upon a trust, and if that be broken it is forfeited; but a judgment of seizure can not be proper in such a case, for if it be dissolved, to what purpose should it be seized? Therefore, by this judgment in the quo warranto the corporation was not dissolved, for it neither extinguishes nor dissolves the body politic. Wherever any judgment is given

tion has been recognized in New York, where it is held, under the statute regulating the use of quo-warranto informations, that where the information is filed against individuals for unlawfully assuming to be a corporation, judgment of ouster is rendered against the individuals themselves, but as against corporations judgment of ouster is rendered for exercising a franchise not authorized by their charter, and in such case the corporation is ousted only of the franchise usurped, and not of being a corporation.[1] So where

for the king for the liberty which is usurped, it is, *quod extinguatur*, and that the person who usurped such a privilege shall not *libertat*, etc., *nullatenus intromittat*, etc., which is the judgment of ouster; but the quo warranto must be brought against particular persons. But where it is for a liberty claimed by the corporation, there it must be brought against the body politic; in which case there may be a seizure of the liberties which will not warrant either the seizure or dissolving of the corporation itself." See, also, as to effect of judgment of ouster upon a corporation, opinion of COLDEN, Senator, in Utica Insurance Co. *v.* Scott, 8 Cow. 720.

[1] People *v.* Rensselaer & Saratoga R. Co. 15 Wend. 113. SAVAGE, C. J., for the court, says, p. 128: "Whenever individuals or a corporation shall be found guilty, either of usurping or intruding into any office or franchise, or of unlawfully holding, judgment of ouster shall be rendered, and a fine may be imposed; but where the proceeding is against a corporation, and a conviction ensues for mis-user, non-user, or surrender, judgment of ouster and of dissolution shall be rendered, which is equivalent to judgment of seizure at common law. If, therefore, the information in this case had for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it should have been filed against individuals; if the object was to effect the dissolution of a corporation which had had an actual existence, or to oust such corporation of some franchise which it unlawfully exercised, then the information is correctly filed against the corporation. The distinction is well exemplified by Sir ROBERT SAWYER, in The King *v.* The City of London, cited in 2 T. R. 522. He says the rule is this: When it clearly appears to the court that a liberty is usurped by wrong, and upon no title, judgment only of ouster shall be entered. But when it appears that a liberty has been granted, but has been misused, judgment of seizure into the king's hands shall be given. The reason is given: that which came from the king is returned there by seizure; but that which never came from him, but was usurped, shall be declared null and void. Judgment of ouster is rendered against individuals for unlawfully assuming to be a corporation. It is ren-

trustees of an incorporated village fail to show a good * 544 title to their office, on proceedings against them by information to test their title, judgment of ouster will be rendered against the trustees themselves, but not against the corporation.[1] But in Vermont, it is held, that where the information is filed to test the right to exercise the franchise of a municipal corporation, and the court determines that the organization of the pretended corporation is a mere usurpation of a corporate franchise, without any legal warrant, judgment may be given that the pretended corporation be dissolved.[2] Where, however, the proceedings are instituted against a mere agent of the corporation, there can be no judgment of seizure of the corporate franchise for an abuse of the charter, such judgment being proper only in proceedings against the corporation itself.[3]

§ 754. As regards the judgment of ouster at common law, it is to be observed that it is not at all dependent upon whether the respondent does or does not claim a right to exercise the office or franchise in controversy, the question being whether he has done any act which necessarily implies a claim to its exercise. And if such act can be shown, judgment of ouster will be given, notwithstanding the usurpation has ceased before the trial.[4] So where a statute gives the prevailing party in proceedings upon a quo-war- * 545 ranto information the right to costs absolutely, the court will give judgment of ouster, notwithstanding the information is entirely fruitless, the term of office having long since expired.[5] And the fact that respondent's term

dered against corporations for exercising a franchise not authorized by their charter. In such case the corporation is ousted of such franchise, but not of being a corporation. Judgment of seizure is given against a corporation for a forfeiture of its corporate privileges." See also People v. Bartlett, 6 Wend. 422.

[1] People v. Bartlett, 6 Wend. 422.

[2] State v. Bradford, 32 Vt. 50.

[3] Smith v. The State, 21 Ark. 294.

[4] King v. Williams, 1 Black. W. 93. But see State v. Taylor, 12 Ohio St. 130.

[5] People v. Loomis, 8 Wend. 396.

of office has expired pending the proceedings will not prevent judgment of ouster against him.[1]

§ 755. While it is competent upon judgment against a corporation, on a quo-warranto information for a violation of its charter, to award that the privileges, liberties and franchises of the corporation be seized into the custody of the state, it is error to award that the goods, chattels, credits and effects of the respondent be seized into the custody of the state. The ownership of the corporation does not terminate until its dissolution, and the better doctrine is, as we have already seen, that the judgment of seizure does not of itself work a dissolution. Hence nothing is forfeited to the state but the corporate franchises and liberties, which came from the state originally.[2] But when the action is brought against a

[1] Hammer v. The State, 44 N. J. L. 667.

[2] State Bank v. The State, 1 Blackf. 267. This was a quo-warranto information for the purpose of determining whether the respondent, a banking corporation, had violated its charter. The respondent being found guilty, judgment was rendered that "the privileges, liberties and franchises of said president, directors and company of the said bank be seized into the hands and custody of the said state, together with all and singular their goods and chattels, rights, credits and effects, and all and singular their lands, tenements and hereditaments, of what kind, nature and description soever, with costs" etc. The court, HOLMAN, J., say: "There are but two grounds on which it can be contended that the corporate effects fall into the hands of the state: 1st, as a forfeiture for abusing the franchises; or 2nd, for the want of an owner by the dissolution of the corporation. When we examine the first of these grounds, we find nothing in the books to support an idea that the abuse of corporate franchises occasions a forfeiture of lands or goods, rights or credits, or, in fact, occasions any other forfeiture but the franchises themselves. The consequence of a breach of the implied condition on which their liberties were granted, was not that they should forfeit their property or possessions if they abused their franchises, but only that they should forfeit the franchises. That which comes out of the hands of the king is the proper subject of forfeiture, the king, by the seizure, resuming what originally flowed from his bounty. Authorities leading to this conclusion are numerous. See the cases cited in 2 Bac. 82, and in The King v. Amery, 2 T. R. 515. For the forfeiture is the same for non-user, when no property has been held or rights exercised, as for misuser or abuser, after the possession of much property and the exercise of

corporation for the usurpation of corporate franchises, it is competent for the state to waive a judgment of forfeiture of the charter, and to take judgment excluding the corporation from the use of the particular franchise which it has usurped.[1]

§ 756. The effect of judgment of ouster upon the officer himself, when the information is brought to * 546 test the right of one usurping an office, is to constitute a full and complete amotion from the office, and to render null and void all pretended official acts of the officer after such judgment, and the party thus ousted is entirely divested of all official authority and excluded from the office as long as the judgment remains in force.[2] Such judgment is therefore regarded as an effectual bar to proceedings in mandamus, to procure a restoration to the office.[3] And in such case,

extensive rights and credits; and the judgment is the same in both cases. Consequently, the judgment could not direct a seizure of the corporate possessions, as a forfeiture for the violation of the charter. Nor is the second ground—that the property falls to the state for the want of an owner, on the dissolution of the corporation—more tenable as a foundation on which to sustain this judgment. For the ownership of the corporation does not cease until its dissolution. And whether it is dissolved by the judgment of seizure or not, until the state has execution on that judgment, is not here very material. For if the corporation is dissolved by the judgment the judgment must be regularly entered, and have its full effect before the dissolution takes place; and it is not till then that the property can be said to be without an owner. The loss of the property to the corporation is a consequence of the judgment; and it is a contradiction of the first principles of reason, a complete reversal of effect and cause, to make such loss of property a part of the judgment. That which can not exist until after the judgment, can never be the subject-matter on which the judgment is given. But the better opinion seems to be, that the corporation is not dissolved by the judgment of seizure, but that it exists until the franchises are seized by the execution on that judgment. See 2 Kyd on Cor. 409, 10, and the authorities there cited. Consequently, the last shadow of a support for this judgment, on this ground, must vanish."

[1] Central & G. R. Co. *v.* The People, 5 Col. 39.

[2] King *v.* Serle, 8 Mod. Rep. 332; State *v.* Johnson, 40 Geo. 164. And see King *v.* Hull, 11 Mod. Rep. 390.

[3] King *v.* Serle, 8 Mod. Rep. 332.

the court will presume, upon its judgment being made known to the chief executive officer of the state, whose duty it is to commission officers, that he will comply with the judgment and commission the person entitled to the office as declared by the judgment of the court. Upon this presumption an attachment will be refused against the unsuccessful * 547 party for contempt of court in still assuming to exercise the functions of the office.[1]

§ 757. It is to be observed, however, that judgment of ouster does not necessarily have the effect of declaring that a vacancy exists in the office, since this is necessarily dependent upon the further question of whether there is any one else entitled to the office.[2] And it is competent for the court, upon the hearing, to give judgment of ouster against the respondent, without determining as to the relator's right, and where there is doubt as to the relator's election to the office in controversy, judgment may be given against the respondent, leaving the relator's right to be determined by another proceeding.[3]

§ 758. The propriety of imposing a fine in addition to judgment of ouster is usually regarded as a matter of sound judicial discretion, and when no improper motives are alleged or shown against the party ousted, the fine imposed will be merely nominal.[4] And although the omission of a fine may be technically improper, yet it is so conclusively for the benefit of the respondents that they can not afterwards assign it for error.[5]

§ 759. As regards the objection that leave of court was not obtained in the first instance to the filing of the information, it is held to be merely formal, and after judgment of ouster is obtained the judgment will not be reversed because

[1] State v. Johnson, 40 Geo. 164.

[2] State v. Ralls County Court, 45 Mo. 58.

[3] People v. Phillips, 1 Denio, 388.

[4] State v. Brown, 5 R. I. 1.

[5] State Bank v. The State, 1 Blackf. 267.

of such objection.[1] And where, upon overruling respondent's demurrer to the petition or information, the court is satisfied that he can not be benefitted by permission to answer, judgment of ouster may be rendered forthwith.[2] So when the information is defective in failing to show in what manner and in what class of cases respondent has usurped the power in question, and the return or answer presents a complete bar to the information, to which the prosecutor demurs, and the court overrules the demurrer to the return but sustains it as a demurrer to the information, it is proper to render judgment for respondent.[3]

§ 760. Judgment of ouster may be given against one who was not duly elected to the office claimed, notwithstanding the return or certificate of a board of canvassers of the election in his favor, since such return is by no means conclusive and the courts may go behind it and examine * 548 the facts as to the legality of the election.[4] Nor will the holding of a commission for the office prevent the court from giving judgment of ouster, if the incumbent was not legally elected, since the title to the office is derived from the election and not from the commission.[5] Even though the incumbent was properly elected in the first instance, yet if he was never sworn into the office, judgment of ouster may be given.[6]

§ 761. In Alabama, it is held that the refusal of a court of general common-law jurisdiction to allow an information in the nature of a quo warranto to be filed, upon the relation of a private citizen claiming a right to the franchise or office which is alleged to have been usurped, is so far a final judgment that it may be reviewed on writ of error.[7] But in

[1] Dickson *v.* The People, 17 Ill. 197.

[2] State *v.* Dousman, 28 Wis. 541; Commonwealth *v.* Walter, 86 Pa. St. 15.

[3] People *v.* Canty, 55 Ill. 33.

[4] People *v.* Van Slyck, 4 Cow. 297; State *v.* Steers, 44 Mo. 223.

[5] State *v.* Steers, 44 Mo. 223.

[6] *In re* Mayor of Penryn, Stra. 582.

[7] State *v.* Burnett, 2 Ala. 140.

Nebraska, it is held that the refusal of a court which has granted judgment of ouster to order a supersedeas of its judgment, or a stay of proceedings until the cause can be reviewed, is not such an order as can be reviewed in an appellate tribunal, in the absence of any statute authorizing such a procedure.[1]

[1] Gandy v. The State, 10 Neb. 243.

THE

LAW OF PROHIBITION.

CHAPTER XXI.

OF THE WRIT OF PROHIBITION.

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I. NATURE AND PURPOSE OF THE WRIT.

§ 762. Definition of the writ.
763. Comparison of prohibition with mandamus and injunction.
764. Ancient origin of the writ; used in England against ecclesiastical courts.
765. The writ used in this country; courts granting it; not a writ of right.
766. A preventive rather than a corrective remedy; only operative upon particular suit.
767. Only allowed for usurpation of power; not granted where court has jurisdiction.
768. Proceedings not a part of original action.
769. Distinction as to proceedings of a judicial and of a ministerial nature; writ only granted for the former.
770. Prohibition not granted where other remedy exists.
771. Not granted where relief may be had by appeal.
772. Not allowed to take the place of writ of error or certiorari.

§ 762. The writ of prohibition may be defined as * 549 an extraordinary judicial writ, issuing out of a court

ished by positive statutory enactment.[1] Being an extraordinary remedy, however, it issues only in cases of extreme necessity, and before it can be granted it must appear that the party aggrieved has applied in vain to the inferior tribunal for relief. The jurisdiction is exercised by appellate or superior courts to restrain inferior courts from acting without authority of law, where damage and injustice are likely to follow from such action. And to this extent it may be regarded as one of the means by which appellate courts exercise their jurisdiction,[2] although as we shall hereafter see, it does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal or writ of error. Nor is it a writ of right, granted *ex debito justitiæ*, but rather * 552 one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case.[3] And being a prerogative writ, it is to be used, like all other prerogative writs, with great caution and forbearance, for the furtherance of justice and to secure order and regularity in judicial proceedings, when none of the ordinary remedies provided by law are applicable.[4] Nor should it be granted except in a clear case of want of jurisdiction in the court whose action it is sought to prohibit.[5]

§ 766. Another distinguishing feature of the writ is that it is a preventive rather than a corrective remedy, and issues only to prevent the commission of a future act, and not to undo an act already performed.[6] When, therefore, the pro-

[1] Arnold *v.* Shields, 5 Dana, 18. As to the history of the remedy in Massachusetts, see Connecticut River R. Co. *v.* County Commissioners, 127 Mass. 50. As to the nature and use of the remedy under the California code of procedure, see Rickey *v.* Superior Court, 59 Cal. 661.

[2] State *v.* Judge of Commercial Court, 4 Rob. La. 48. And see State *v.* Judge of Fourth Judicial District, 10 Rob. La. 169.

[3] Kinloch *v.* Harvey, Harp. 508; Supervisors of Bedford *v.* Wingfield, 27 Grat. 329; State *v.* Monroe, 33 La. An. 923; State *v.* Rightor, 32 La. An. 1182; *Ex parte* Hamilton, 51 Ala. 62; People *v.* Westbrook, 89 N. Y. 152.

[4] Washburn *v.* Phillips, 2 Metc. 296.

[5] Hart *v.* Taylor, 61 Ga. 156.

[6] State *v.* Stackhouse, 14 S. C. 417.

ceedings which it is sought to prohibit have already been disposed of by the court, and nothing remains to be done either by the court or by the parties, the cause having been absolutely dismissed by the inferior tribunal, prohibition will not lie, even though the case was thus disposed of after service upon the court of a rule to show cause why the writ should not issue. Nor will the suggestion that there are other suits of the same nature pending against the relator in the same court avail to procure the writ, since the court will not issue a prohibition in a case where it is not justified, for the sole purpose of establishing a principle to govern other cases.[1] And the

[1] United States v. Hoffman, 4 Wal. 158. This was a rule *nisi* by the Supreme Court of the United States, commanding a district court to show cause why a prohibition should not issue to restrain certain proceedings in admiralty. The return alleged that after service of the rule the admiralty suit had been dismissed by libellant on his own motion and at his own costs. Mr. Justice MILLER, for the court, says: "The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition can not undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action and to prevent any further proceeding in the prohibited direction. In the case before us the writ, from its very nature, could do no more than forbid the judge of the district court from proceeding any further in the case in admiralty. The return shows that such an order is unnecessary, and will be wholly useless, for the case is not now pending before that court, and there is no reason to suppose that it will be in any manner revived or brought up again for action. The facts shown by the return negative such a presumption. Counsel has argued very ingeniously that the case should be considered as remaining in the court below in the same position as it was when the rule issued from this court; but we can not so regard it. By the action of the libellant and the consent of the court, the case is out of court, and the relator is no longer harrassed by an attempt to exercise over him a jurisdiction which he claims to be unwarranted. If the return shows no more, it shows that the district judge has no intention of proceeding further in that case. Now, ought the writ to issue to him under such circumstances? It seems to be an offensive and useless exercise of authority for the court to order it. The suggestion that there are or may be other cases against the relator of the same character can

writ only operates upon the particular suit or proceeding in the court to which it is directed, and it does not affect or stay proceedings in another court upon questions pertaining to the former controversy.[1]

§ 767. It follows from the extraordinary nature
* 553 of the remedy, as already considered, that the exercise of the jurisdiction is limited to cases where it is necessary to give a general superintendence and control over inferior tribunals, and it is never allowed except in cases of a usurpation or abuse of power, and not then unless other ex-

have no legal force in this case. If they are now pending, and the relator will satisfy the court that they are proper cases for the exercise of the court's authority, it would probably issue writs instead of a rule, but a writ in this case could not restrain the judge in the other cases by its own force, and could affect his action only so far as he might respect the principle on which the court acted in this case. We are not now prepared to adopt the rule that we will issue a writ in a case where its issue is not justified, for the sole purpose of establishing a principle to govern other cases. We have examined carefully all the cases referred to by counsel which show that a prohibition may issue after sentence or judgment; but in all these cases something remained which the court or party to whom the writ was directed might do, and probably would have done, as the collection of costs, or otherwise enforcing the sentence. Here the return shows that nothing is left to be done in the case. It is altogether gone out of the court. These views are supported by the following cases: In United States *v.* Peters, 3 Dallas, 121, which was an application for prohibition to the admiralty, this court suspended its decision to give the libellant an opportunity to dismiss his libel. The court finally issued the writ, but there seems no reason to doubt, from the report of the case, that it would have considered such action by the libellant as an answer to the request for the writ. In the case of Hall *v.* Norwood, Siderfin, 165—a very old case, when writs of prohibition were much more common than now,—a prohibition was asked to a court of the Cinque Ports, at Dover. While the case was under consideration, the reporter says: 'On the other hand the court was informed that they had proceeded to judgment and execution at Dover, and therefore that they move here too late for a prohibition, and of this opinion was the court, since there is no person to be prohibited, and possessions are never taken away or disturbed by prohibition.' The marginal note by the reporter is this: 'Prohibition will not lie after the cause is ended.' The rule heretofore granted in this case is discharged."

[1] Thompson *v.* Tracy, 60 N. Y. 31.

isting remedies are inadequate to afford relief.[1] In other words, the remedy is employed only to restrain * 554 courts from acting in excess of their powers, and if their proceedings are within the limits of their jurisdiction prohibition will not lie.[2] If, therefore, the inferior court has jurisdiction of the subject-matter in controversy, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy by prohibition.[3] Thus, it will not lie to prevent an inferior court from proceeding under a rule to show cause why a mandamus should not issue, on the ground that the rule was improperly issued, provided the court had jurisdiction by mandamus.[4] And upon the application for the writ the only inquiry which will be entertained is as to the jurisdiction of the court against which the relief is invoked.[5]

§ 768. As regards the nature of the proceeding or action in prohibition, it is to be observed that it is in no sense a part or continuation of the action prohibited, by removing it from a lower to a higher court for the purpose of obtaining a decision in the latter tribunal. So far from this, it is regarded as wholly collateral to the original proceeding, being intended to arrest that proceeding, and to prevent its further prosecution by a court having no jurisdiction of the subject-matter in dispute. In other words, it is substantially a proceeding between two courts, a superior and an inferior, and is the means by which the superior tribunal exercises its superintendence over the inferior, and keeps it within the limits of its rightful jurisdiction. It is manifest, therefore, that the

[1] *Ex parte* Greene, 29 Ala. 52. See *Ex parte* Smith, 34 Ala. 456; Jacks *v.* Adair, 33 Ark. 161; People *v.* Supervisors, 47 Cal. 81; People *v.* Whitney, 47 Cal. 584.

[2] State *v.* Gary, 33 Wis. 93; State *v.* Judge of Superior District Court, 29 La. An. 360; State *v.* Skinner, 32 La. An. 1092.

[3] *Ex parte* Greene, 29 Ala. 52; *Ex parte* Peterson, 33 Ala. 74; *Ex parte* State, 51 Ala. 60; Buskirk *v.* Judge of Circuit Court, 7 West Va. 91; Murphy *v.* Superior Court, 58 Cal. 520.

[4] *Ex parte* Peterson, 33 Ala. 74.

[5] State *v.* Judge of Twenty-sixth District Court, 34 La. An. 782.

remedy by prohibition is distinct from and independent of the original proceeding, although collateral to it, and that, whether the original action is civil or criminal, the nature and object of the remedy by prohibition are the same, it being a civil proceeding to recover damages for the exercise of an unlawful jurisdiction, and to prevent its further exercise.[1]

§ 769. A distinction is taken, in the exercise of the jurisdiction, between cases where the proceedings of the * 555 court which it is sought to prohibit are of a judicial nature, and cases where they are merely administrative or ministerial. And while the writ will lie in proper cases as to matters of a purely judicial nature, it will not go if the proceedings which it is sought to prevent are only ministerial.[2] Thus, it will not lie to prevent the issuing of an execution, this being regarded as in no sense a judicial, but only a ministerial act.[3] And where an inferior court of limited jurisdiction, in addition to its judicial powers, is vested with certain functions of an administrative or ministerial nature, prohibition will not lie as to the latter.[4] Nor will it lie to restrain a judge who is not acting in a judicial capacity, but merely as a commissioner in the taking of testimony.[5]

§ 770. Like all other extraordinary remedies, prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress. And it is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding

[1] Mayo v. James, 12 Grat. 17.

[2] *Ex parte* Braudlacht, 2 Hill, 367; State v. Clark Co. Court, 41 Mo. 44; State v. Gary, 33 Wis. 93. "The office of a prohibition," says Mr. Justice COWEN, in *Ex parte* Braudlacht, "is to prevent courts from going beyond their jurisdiction in the exercise of judicial, not ministerial power. Otherwise we might be called on to send the writ whenever a justice of the peace was about to issue civil or even criminal process irregularly."

[3] *Ex parte* Braudlacht, 2 Hill, 367; Atkins v. Siddons, 66 Ala. 453.

[4] State v. Clark Co. Court, 41 Mo. 44.

[5] State v. Spearing, 31 La. An. 122.

the writ that the party aggrieved has another and complete remedy at law.[1]

§ 771. It follows necessarily from the doctrine laid down in the foregoing section, that the writ will * 556 not be allowed to take the place of an appeal, nor will it be granted as an exercise of purely appellate jurisdiction. In all cases, therefore, where the party aggrieved may have ample remedy by an appeal from the order or judgment of the inferior court, prohibition will not lie, no such pressing necessity appearing in such cases as to warrant the interposition of this extraordinary remedy, and the writ not being one of absolute right, but resting largely in the sound discretion of the court.[2] Thus, where the defendant in an action insti-

[1] *Ex parte* Braudlacht, 2 Hill, 367; State *v.* Judge of County Court, 11 Wis. 50; State *v.* Braun, 31 Wis. 600; Sherlock *v.* City of Jacksonville, 17 Fla. 93; Cooper *v.* Stocker, 9 Rich. 292; State *v.* Judge of Fourth District Court, 11 La. An. 696; State *v.* Judge of Fourth District Court, 21 La. An. 123; People *v.* Seward, 7 Wend. 518; *Ex parte* Hamilton, 51 Ala. 62; *Ex parte* Mobile & Ohio R. Co. 63 Ala. 349; Sasseen *v.* Hammond, 18 B. Mon. 672. *Ex parte* Braudlacht, 2 Hill, 367, was an application for a writ of prohibition to restrain the issuing of an execution upon a judgment in an inferior court which had been removed by certiorari to an appellate court. Mr. Justice COWEN, for the court, says: "There is the less reason in this case for resorting to a prohibition, because the party claiming to be aggrieved has other remedies entirely effectual. If the execution sought for shall turn out to be void, the justice and parties may, should a levy take place, be proceeded against as trespassers; if issued in defiance of the certiorari, the proceeding will be punishable as a contempt. The writ of prohibition, like mandamus, quo warranto or certiorari, ought not to issue where there are other remedies perfectly adequate. We have a discretion to grant or deny the writ, (GANTT, J., in State *v.* Hudnall, 2 Nott. & McC. 419, 423;) and it would, I apprehend, in general, be a very good reason for denying it, that the party has a complete remedy in some other and more ordinary form."

[2] State *v.* Judge of Fourth District Court, 21 La. An. 123; People *v.* Wayne Circuit Court, 11 Mich. 393; McDonald *v.* Elfe, 1 N. & M. 501; State *v.* Wakely, 2 N. & M. 410; State *v.* Nathan, 4 Rich. 513; State *v.* Judge of Fourth District Court, 11 La. An. 696; *Ex parte* Peterson, 33 Ala. 74; People *v.* Marine Court, 36 Barb. 341; Symes *v.* Symes, Burr. 813; Wreden *v.* Superior Court, 55 Cal. 504; *Ex parte* Reid, 50 Ala. 439; State *v.* Municipal

tuted in an inferior court, pleads to the jurisdiction of such court, and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal from the final judgment in the cause.[1] Nor will the writ go to restrain an inferior court from proceeding with certain attachment suits, upon the ground of the insufficiency of the affidavit on which the attachments were issued, since the court itself may afford relief, or the party aggrieved may resort to an appeal.[2] And it has been held that the writ is not an appropriate remedy in a court of purely appellate jurisdiction, the revisory powers of such court being considered adequate to afford relief from the action of subordinate tribunals.[3] It follows, also, from the principles already considered, that mere irregularities in the proceedings of an inferior court are not sufficient warrant for granting a prohibition, since the allowance of the writ upon such grounds would be the exercise of appellate power, and the writ is
* 557 never granted for appellate purposes, nor to review the proceedings of a subordinate court.[4]

§ 772. Another fundamental principle, and one which is to be constantly borne in mind in determining whether an

Court of St. Paul, 26 Minn. 162; State v. District Court for Ramsey Co. 26 Minn. 233; People v. Nichols, 79 N. Y. 582; State v. Rightor, 32 La. An. 1182. But the doctrine of the text has been held to be inapplicable to a case where the court was attempting to enforce an order by proceedings for contempt, without jurisdiction. State v. Wilcox, 24 Minn. 143. And prohibition will lie to prevent the enforcement of a decree which is a nullity, when from the circumstances of the case and the absence of adverse parties no appeal will lie. *Ex parte* Lyon, 60 Ala. 650. In Louisiana the remedy is used only in aid of the appellate jurisdiction of the supreme court. And when the action of the inferior court can be brought to the supreme court for review, and the question of its jurisdiction can then be determined, the writ will be refused. State v. Judge of Second District Court, 25 La. An. 381; State v. Judge of Superior District Court, 26 La. An. 146.

[1] State v. Judge of Fourth District Court, 11 La. An. 696.

[2] People v. Marine Court, 36 Barb. 341.

[3] Sasseen v. Hammond, 18 B. Mon. 672.

[4] McDonald v. Elfe, 1 N. & M. 501; State v. Wakely, 2 N. & M. 410.

appropriate case is presented for the exercise of this extraordinary jurisdiction, is, that the writ is never allowed to usurp the functions of a writ of error or certiorari, and can never be employed as a process for the correction of errors of inferior tribunals. And the courts will not permit the writ of prohibition, which proceeds upon the ground of an excess of jurisdiction, to take the place of or be confounded with a writ of error, which proceeds upon the ground of error in the exercise of a jurisdiction which is conceded. The proper function of a prohibition being to check the usurpations of inferior tribunals, and to confine them within the limits prescribed for their operation by law, it does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate. In all cases, therefore, where the inferior court has jurisdiction of the matter in controversy, the superior court will refuse to interfere by prohibition, and will leave the party aggrieved to pursue the ordinary remedies for the correction of errors, such as the writ of error or certiorari.[1] In the application of the principle, it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of that jurisdiction.[2] Nor will the court which is asked to grant the writ consider whether the court below erred in the exercise of its powers, since it has nothing to do with the correctness of the rulings of the inferior court, but only with its excess of jurisdiction.[3]

[1] *Ex parte* Ellyson, 20 Grat. 10; Arnold *v.* Shields, 5 Dana, 18; Wilson *v.* Berkstresser, 45 Mo. 283; Cooper *v.* Stocker, 9 Rich. 292; *Ex parte* Blackburn, 5 Ark. 21; State *v.* Columbia & Augusta R. Co. 1 Rich. N. S. 46; *Ex parte* Gordon, 2 Hill, 363; People *v.* Seward, 7 Wend. 518; Supervisors *v.* Wingfield, 27 Grat. 329; Hogan *v.* Guigon, 29 Grat. 705; *Ex parte* Brown, 58 Ala. 536; Leonard *v.* Bartels, 4 Col. 95.

[2] Wilson *v.* Berkstresser, 45 Mo. 283.

[3] State *v.* Cole, 33 La. An. 1356. But in Massachusetts, it is held that the fact that the party aggrieved may have a remedy by certiorari, after final judgment, will not prevent the court from interfering by prohibition, he having objected to the jurisdiction of the inferior tri-

II. Principles Governing the Jurisdiction.

§ 773. Plea to the jurisdiction must be interposed in court below.
774. Distinction as to granting prohibition before or after judgment of the inferior court.
775. Must be some person against whom writ can be enforced; sentence of court martial.
776. Granted against courts of equity; appointment of receivers.
777. Granted against justices of peace and petty courts.
778. Parties not allowed to make a jurisdiction by dividing cause of action in petty courts.
778 *a*. Referees and commissioners to determine compensation for right of way.
779. Parties to the proceeding; degree of interest required.
780. Intention of court to proceed must clearly appear.
781. Writ may be granted where court has jurisdiction, but has exceeded its powers.
782. Jurisdiction limited to judicial tribunals; taxing officers.
783. Not granted to prevent governor from issuing commission; nor against mayor.
784. Common-law rules applicable; board of county officers.
785. Of the courts entrusted with the jurisdiction.
785 *a*. The same.
786. Jurisdiction of the United States courts.
787. Prohibition from federal to state courts.
787 *a*. Removal of causes.
788. Questions of jurisdiction to be determined by superior court.
789. Writ lies pending appeal from inferior court.
790. Illustrations of the jurisdiction.
791. Writ granted to protect records and seal of superior court.
792. When refused against court martial.
793. Granted against probating estate of deceased Indian.
794. Writ of error and appeal.

§ 773. At common law, to authorize a prohibition
* 558 to an inferior court for want of jurisdiction, it was necessary that a plea to the jurisdiction should be tendered in that court before imparlance, and that the court

bunal in the first instance. Connecticut River R. Co. *v.* County Commissioners, 127 Mass. 50; Henshaw *v.* Cotton, 127 Mass. 60.

should refuse to entertain the plea.[1] The common-law rule is believed to be generally applicable in this country, and the writ will not go to a subordinate tribunal in a cause arising out of its jurisdiction until the want of jurisdiction has first been pleaded in the court below and the plea refused.
And when there has been no effort made to obtain * 559 relief in the court which it is sought to prohibit, the superior courts will refuse to exercise their jurisdiction by this extraordinary remedy.[2] For example, when an injunction has been obtained in direct violation of statute, and without any jurisdiction on the part of the court, prohibition will not be granted to prevent the court from proceeding with the injunction suit when no application has been made to dissolve the injunction.[3] So when it is sought to prohibit the court below from issuing a writ of mandamus, but it is not shown that any effort has been made to prevent the issuing of the mandamus, either by plea to the jurisdiction or otherwise, the prohibition will be refused.[4]

§ 774. As regards the stage of the cause in the court below, at which the application for the writ may be made, some apparent conflict of authority may be observed running through the adjudicated cases, as to whether it should be made before or after the decision of the court, although the true test may be readily applied by observing a simple distinction. That distinction is, as to whether the want of jurisdiction in the subordinate court, which is relied upon as the foundation for the writ, is apparent upon the face of the proceedings sought to be prohibited. And while it is undoubtedly true that after a court has proceeded as far as verdict

[1] Edmundson *v.* Walker, Carth. 166; Cox *v.* St. Albans, 1 Mod. Rep. 81; Bouton *v.* Hursler, 1 Barn. K. B. 71.

[2] *Ex parte* McMeechen, 12 Ark. 70; *Ex parte* City of Little Rock, 26 Ark. 52; *Ex parte* Hamilton, 51 Ala. 62; State *v.* Judge of Fifth District Court, 29 La. An. 806; Hudson *v.* Judge of Superior Court, 42 Mich. 239; Southern Pacific R. Co. *v.* Superior Court, 59 Cal. 471.

[3] *Ex parte* McMeechen, 12 Ark. 70.

[4] *Ex parte* City of Little Rock, 26 Ark. 52.

and judgment, or sentence, prohibition will not lie for a want of jurisdiction not apparent upon the record,[1] yet the rule is supported by a strong array of authority, that * 560 where the defect or failure of jurisdiction is apparent upon the face of the proceedings which it is sought to prohibit, the superior tribunal may interpose the extraordinary aid of a prohibition at any stage of the proceedings below, even after verdict, sentence or judgment.[2] And where the want of jurisdiction is thus apparent upon the

[1] Com. Dig. Prohibition, D; Jackson v. Neale, 1 Lev. part II. 230; Buggin v. Bennett, Burr. 2037. The rule as stated by Lord MANSFIELD in the latter case is this: "If it appears upon the face of the proceedings that the court below have no jurisdiction, the prohibition may be issued at any time, either before or after sentence, because all is a nullity; it is *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by and suffer that court to go on under an apparent jurisdiction, it would be unreasonable that this party, who when defendant below had thus lain by and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the court below."

[2] Smith v. Langley, Ca. Temp. H. 317; Keech v. Potts, 1 Keb. 3; Catchside v. Ovington, Burr. 1922; Asgill v. Hunt, 10 Mod. Rep. 439; Chickham v. Dickson, 12 Mod. Rep. 132; Pool v. Gardner, Ib. 206; Evans v. Gwyn, 5 Ad. & E. N. S. 844. See also Anon. 2 Barn. K. B. 169; Blacquiere v. Hawkins, Doug. 378; King v. Broom, 12 Mod. Rep. 134; Anon. Freem. K. B. 78; Gardner v. Booth, 2 Salk. 549. But see Parker v. Clerke, 3 Salk. 87. "The rule of granting prohibition before or after sentence is this: That before sentence you may have a prohibition upon suggestion of a matter of fact, not appearing upon the face of the proceedings below; but after sentence you can not overturn the proceedings by a bare averment of a fact; yet, if there be a want of jurisdiction appearing upon the face of the libel, or any part of their proceedings, that is sufficient ground for a prohibition after sentence, whether the cause be in an ecclesiastical court, or in the court of admiralty." Lord HARDWICKE, in Smith v. Langley, Ca. Temp. H. 317. But in Anon. 3 Salk. 288, a distinction was taken between cases pending in the spiritual and admiralty courts, and cases in the inferior courts of law. And it was held that where an action was begun in an inferior court of law having no jurisdiction of the cause, a prohibition would not lie after sentence, but otherwise if the suit

record, prohibition will lie after sentence, even though part of the cause of action may have been within the jurisdiction of the inferior tribunal, since it will not be permitted to make a jurisdiction for itself, by coupling matters beyond its control with those upon which it may rightfully adjudicate.[1] Where, however, the inferior court has jurisdiction of the principal point in controversy, but not of certain matters arising collaterally therein, and the defendant below pleads to the merits and submits to trial, without relying upon the want of jurisdiction as to such collateral matters until after sentence, he is too late in his application for the aid of a prohibition.[2] * 561

were begun in the admiralty or spiritual courts, since their law is different from the common law.

[1] Evans *v.* Gwyn, 5 Ad. & E. N. S. 844. In Virginia, it is held that the writ may be granted, notwithstanding judgment has been rendered by the inferior court, in the action which it is sought to prohibit, before the rule to show cause is awarded. French *v.* Noel, 22 Grat. 454.

[2] Full *v.* Hutchins, Cowp. 422. The rule, with the reasons in support of it, is very clearly stated in this case by Lord MANSFIELD as follows: "The case is, that the defendant Hutchins libelled in the ecclesiastical court for tithes, Full, the plaintiff, set up a *modus*, and several customs, which he alleged to be time immemorial, or at least for forty years past. Witnesses were examined, the cause was heard, and sentence given against the customs. Full has now made application to this court for a prohibition upon the following ground: That his defense below was a plea of immemorial customs; that an immemorial custom is a matter properly triable at common law, and therefore it appears on the face of the proceedings, that this is a case where the spiritual court had no jurisdiction. The question is, whether this application, being made after sentence, is not too late? Upon consideration of the principles on which this doctrine is founded, and upon looking into the case, we are all of opinion that the defendant in this case comes too late after sentence. Where matters, which are triable at common law, arise incidentally in a cause, and the ecclesiastical court has jurisdiction in the principal point, this court will not grant a prohibtion to stay trial. For instance, if the construction of an act of parliament comes in question, or a release be pleaded, they shall not be prohibited, unless the court proceed to try contrary to the principles and course of the common law; as if they refuse one witness, etc. And this is expressly laid down by Lord HALE, in 2 Lev. 64, Sir Wm. Juxon *v.* Lord Byron. There is another

§ 775. To warrant the exercise of the jurisdiction, there must in all cases be some court or person to whom the writ may be addressed and against whom it may be enforced.

Thus, in England, prohibition will not lie against the * 562 execution of the sentence of a court martial, after the sentence has been carried into effect by the king, and the court martial has ceased to exist, since there is then no

denomination of cases under which the present case comes, where matters are so properly and essentially triable at common law, that if the party comes for a prohibition before sentence, this court will grant it for the sake of the trial. But if the party submit to trial, he is afterwards too late. The distinction in respect of cases where a prohibition does or does not lie after sentence, is this: If it appears on the face of the libel, that the ecclesiastical court has no jurisdiction of the cause, a prohibition shall go; because there, *interest reipublicæ* that they should not encroach upon the jurisdiction of the temporal courts; and in such case, their sentence is a nullity. Therefore, in the case of Paxton *v.* Knight, 1 Burr. 314, the court, though against their inclination, granted a prohibition, because it appeared on the face of the libel that the ecclesiastical court had no jurisdiction. This doctrine and distinction is fully settled and established in a case reported in 10 Mod. 12, Banister *v.* Hopton. There, upon a motion after sentence for a prohibition to the spiritual court, upon a question of prescription, the court held, that though it were a matter triable at common law, yet if the party submit to trial, it will be too late for a prohibition after sentence. In the margin of that case is cited 2 Salk. 548, which is cited for the true distinction where a prohibition shall or shall not lie after sentence; and there it is said, that if it appear in the libel or proceedings of the cause, that the cognizance of the cause does not belong to the spiritual court, a prohibition shall go even after sentence. It shall go where they have no cognizance of the cause, not where there is only a defect of trial. There is another case fully in point to the same distinction; the name of it is, The Churchwardens of Market Bosworth *v.* The Rector of Market Bosworth, Hil. 10 Wm. 3 B. R. 1 Lord Raym. 435. The libel, in that case, was founded upon a custom which the defendant denied; and the decree was against the custom: a prohibition was moved for, because custom or no custom, is a matter triable at law; and this appearing on the libel, the court had no jurisdiction; therefore prohibition ought to go, though after sentence. But the whole court held the contrary. And the reason given is this: that the plaintiffs, having grounded their libel on a custom, which would have been well grounded if the custom had not been denied, shall not, after the custom is found against them, prohibit the court from executing

court or person to whom the writ may be addressed, except the sovereign, who has already executed the sentence.[1]

§ 776. The exercise of the jurisdiction is not confined exclusively to restraining proceedings in courts of law, but extends also to proceedings in equity. And where the supreme court of a state is vested by the constitution of the state with power to issue such "remedial original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions," it may grant a prohibition against any subordinate court, whether of general or limited jurisdiction, and whether a court of law or * 563 of chancery. And where a court of chancery has exceeded its powers in the appointment of a receiver, or in the granting of an injunction, prohibition will lie to restrain it from proceeding.[2] And the writ will lie to prevent a master in chancery from acting in excess of his powers in a judicial matter pending before him.[3] But it will not go to restrain a court of equity while acting within the scope of its jurisdiction.[4] And where such court has full jurisdiction of the case made by the bill, both as regards the subject-matter and the parties, and the appointment of a receiver in the cause is clearly within the scope of its legitimate powers, prohibition will not lie.[5] Nor will the writ be granted against the judge or chancellor of a court of equity to prevent him from entertaining a cause or taking any proceedings therein,

their sentence. For the design of the motion for a prohibition is only to excuse the plaintiffs from costs. But, say the court, there is no reason why they should not pay them, since it appears they have vexed the defendant without cause; and therefore denied the prohibition. The same reason holds here, as in that case. The defendant himself has alleged the custom, and submitted to trial; therefore, there is no reason now why he should have a prohibition to save himself from the costs. We are all of opinion, that the cause shown against the prohibition should be allowed, and the rule discharged."

[1] *In re* Poe, 5 Barn. & Ad. 681.

[2] *Ex parte* Smith, 23 Ala. 94; Henry *v.* Steele, 28 Ark. 455.

[3] Henshaw *v.* Cotton, 127 Mass. 60.

[4] People *v.* Wayne Circuit Court, 11 Mich. 393.

[5] *Ex parte* Walker, 25 Ala. 81.

in the absence of any allegations connecting him actively with the proceedings complained of.[1]

§ 777. Prohibition will also lie against justices of the peace and petty courts of limited and special powers, wherever a proper case is presented warranting the exercise of the jurisdiction. Thus, where justices of the peace are proceeding without authority of law to abate a supposed nuisance, prohibition is the appropriate remedy to stay their action.[2] And where an inferior court has exceeded its jurisdiction by granting a writ of prohibition against a justice of the peace, it may itself be restrained by prohibition from further proceedings.[3] So the writ lies to a municipal court of limited statutory jurisdiction to restrain it from levying a fine beyond the amount fixed by law as the limit of its jurisdiction.[4] So, too, it lies against such court in behalf of one who has been discharged under the insolvent laws of the state, to prevent the enforcement of a fine incurred before his discharge.[5] Where, however, the decision of the inferior tribunal is by law final and conclusive upon the question
* 564 decided, prohibition will not go to prevent the enforcement of such decision. Thus, where the mayor of a city is by the charter vested with certain powers as a magistrate, and his decision is final as to fines imposed up to a certain amount, he can not be restrained by prohibition from the enforcement of a fine imposed by him within the statutory limit.[6]

§ 778. It is to be observed, with reference to inferior courts, which are limited by law to the decision of controversies where the amount involved falls within a specified sum, as in justice courts, and other petty tribunals, that they will not be allowed to manufacture a jurisdiction for them-

[1] *Ex parte* Greene, 29 Ala. 52.

[2] South Carolina R. Co. *v.* Ells, 40 Ga. 87.

[3] Jackson *v.* Maxwell, 5 Rand. 636.

[4] Zylstra *v.* Corporation of Charleston, 1 Bay, 382.

[5] Wall *v.* Court of Wardens, 1 Bay, 434.

[6] Wertheimer *v.* Mayor of Boonville, 29 Mo. 254.

selves by dividing a single matter into several suits, so as to bring them within the limits fixed by law, when the whole amount in controversy is sufficient to bring it within the jurisdiction of a higher court.[1] Thus, where a plaintiff brings several distinct actions before a justice of the peace upon promissory notes against one and the same defendant, each of the notes being for an amount within the jurisdiction of the justice, but the aggregate amount being beyond his jurisdiction, prohibition lies to restrain the justice from proceeding, even after judgment rendered, but before the money has been paid. Such a case presents a clear defect of jurisdiction, since all the notes constitute but one indebtedness.[2] And the writ will lie as against an inferior or petty court of limited powers to prevent its taking cognizance of an action for an amount beyond its jurisdiction, even though the plaintiff voluntarily reduces his demand to bring the case within the jurisdiction of the court. The principle upon which the interference is based in such case, is, that where the law has positively excluded the jurisdiction beyond a certain maximum amount, no man shall be allowed to create a jurisdiction for himself by changing the real position of the parties to the contract at his own volition.[3] If, however, the jurisdiction of the inferior court be undoubted, prohibition * 565 will not go merely because of the inconvenience to which the party may be put by submitting to the proceedings in that court. Thus, it will not be granted to restrain the prosecution of an action before a justice of the peace for an amount within his jurisdiction, upon the ground that the defendant in such action has certain set-offs against the plaintiff to an amount which can not be brought within the

[1] Lawrence *v.* Warbeck, 1 Keb. 260; Girling *v.* Aldas, 2 Keb. 617; Hutson *v.* Lowry, 2 Va. Cas. 42.

[2] Hutson *v.* Lowry, 2 Va. Cas. 42.

[3] Ramsay *v.* Court of Wardens, 2 Bay, 180. But see, *contra*, People *v.* Marine Court of New York, 36 Barb. 341.

jurisdiction of the justice, so that defendant can not avail himself of a plea of set-off in that action.[1]

§ 778 *a*. Referees who are appointed under a statute, to hear and determine the question of a right of way sought by one person over the lands of another, so far partake of the character of a judicial body as to be amenable to the writ of prohibition.[2] So a board of county commissioners, acting in a judicial capacity in determining the damages to be paid for land taken for railway purposes, may be prohibited from proceeding with the enforcement of such damages under a law which is unconstitutional.[3]

§ 779. As regards the parties to the proceeding, less stringency is observed than in the case of the extraordinary remedies heretofore considered. The writ being still regarded as a prerogative remedy, it is usually issued in England in the name of the king, and in this country in the name of the state. But while it is irregular to issue the writ in the name of a private citizen instead of the state, yet if such irregularity in no way affects the merits of the application, the writ will not be set aside where a jurisdiction is usurped without any pretense of right.[4] Prohibition may be granted on the application of either of the parties litigant in the inferior tribunal.[5] And it would seem, both upon principle and authority, that no personal interest in the proceedings sought to be prohibited need be shown by the relator or petitioner to warrant the application, and the writ may be granted upon the application of a stranger to the record. The governing principle in such cases is, that where an inferior court proceeds in excess of its lawful jurisdiction, it is chargeable with a contempt of the sovereign, as well as a grievance to the party injured, and the courts are therefore less stringent as to the degree of interest

[1] Browne *v.* Rowe, 10 Tex. 183.

[2] State *v.* Stackhouse, 14 S. C. 417.

[3] Connecticut River R. Co. *v.* County Commissioners, 127 Mass. 50.

[4] Baldwin *v.* Cooley, 1 Rich. N. S. 256.

[5] Clapham *v.* Wray, 12 Mod. Rep. 423; Com. Dig. Prohibition, E.

required of the applicant than in cases of mandamus and other extraordinary remedies.[1]

§ 780. To warrant a court in granting this extraordinary remedy, it should clearly appear that the * 566 inferior tribunal is actually proceeding, or is about to proceed in some matter over which it possesses no rightful jurisdiction. This may be properly shown by alleging any acts on the part of the court which indicate an intention to proceed, and when such intention is not clearly shown the writ will be denied. And the mere fact that plaintiff's counsel has noticed a motion for hearing before the subordinate court does not show that such tribunal will necessarily entertain the motion, and is not sufficient ground for a prohibition.[2] But since the object of the writ is to prevent an inferior court from proceeding beyond its jurisdiction, if the return to the writ shows a *prima facie* case of jurisdiction in the court below, the prohibition will not be perpetuated.[3] And to warrant the relief it must appear that the court or person against whom the writ is sought is about to exercise judicial or quasi-judicial power, without authority, which will result in an injury for which there is no other remedy.[4]

§ 781. The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but is also extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject-

[1] Com. Dig. Prohibition, E.; Wadsworth *v.* Queen of Spain, 17 Ad. & E. N. S. 171; Trainer *v.* Porter, 45 Mo. 336. Although the question here discussed is not altogether free from doubt, the doctrine of the text has the clear weight of authority in its support. Directly opposed to this doctrine is the case of Queen *v.* Twiss, L. R. 4 Q. B. 407, which denies the right to interfere on behalf of one who is a stranger to the record, and not aggrieved by the alleged excess of jurisdiction. In Forster *v.* Forster, 4 B. & S. 187, the rule is stated to be, that a stranger is entitled to the relief if he shows that he has sustained damage by the alleged excess of jurisdiction.

[2] Prignitz *v.* Fischer, 4 Minn. 366.

[3] State *v.* Judge of Fourth District Court, 20 La. An. 239.

[4] State *v.* Young, 29 Minn. 474.

matter in controversy, has exceeded its legitimate powers.[1] And where, after a conviction for felony, the court has at a subsequent term granted a new trial upon the merits, without any legal authority for so doing, an appropriate case is presented for interference by prohibition, even though the original trial and conviction were fully within the jurisdiction of the court.[2] So when a court is proceeding to enforce a peremp-

[1] Quimbo Appo *v.* The People, 20 N. Y. 531. See also State *v.* Ridgell, 2 Bailey, 560.

[2] Quimbo Appo *v.* The People, 20 N. Y. 531. "It is true," says Mr. Justice SELDEN, p. 541, "that the most frequent occasions for the use of the writ are where a subordinate tribunal assumes to entertain some cause or proceeding over which it has no control. But the necessity for the writ is the same where, in a matter of which such tribunal has jurisdiction, it goes beyond its legitimate powers, and the authorities show that the writ is equally applicable to such a case. Mr. JACOB, in treating of this writ, after saying that it may issue to inferior courts of every description, whether ecclesiastical, temporal, military, or maritime, whenever they attempt to take cognizance of causes over which they have no jurisdiction, adds: 'or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy.' Jac. Law Dic. title Prohibition. In the case of Darby *v.* Cosens, 1 Term R. 552, the defendant, who was vicar of the parish of Long Burton, had sued Darby in an ecclesiastical court for tithes, that being an action appropriate to the jurisdiction of that court, but the defendant having set up a modus by way of defense, an issue was presented which the ecclesiastical court had no authority to try; still, as it assumed to proceed with the case, upon application to the court of kings bench a writ of prohibition was issued. The precise objection made here was taken in the case of Leman *v.* Goulty, 3 Term R. 3, where certain church wardens were cited in the bishop's court to exhibit on oath an account of the moneys received and paid by them. Objections being made to one or two items of the account, the bishop required them to pay a certain amount, and upon their refusing was proceeding still further with the case when a rule was obtained in the court of kings bench to show cause why a writ of prohibition should not issue; and the council, in showing cause, insisted that as the bishop's court had original jurisdiction of the cause, the error should be corrected upon appeal, and was not a ground for a writ of prohibition; but the court allowed the writ, and Lord KENYON, after admitting that for a mere error in giving a judgment which the court had power to render, the writ would not lie, said: 'Now in this case, with respect to the compelling of a production of the church wardens'

tory writ of mandamus, which has been suspended by an appeal, prohibition will lie to prevent its enforcement.[1] So the writ has been allowed where the court below had grossly transcended the bounds prescribed by law, and * 567 had committed an error in a criminal cause, apparent on the face of the record, and involving a question of life and death. Thus, where a court had erroneously convicted a person and passed sentence of death upon him for an offense not capital, the error appearing upon the face of the proceedings, and there being no other means of correcting it, prohibition was granted.[2] The rule is otherwise, however, where ample remedy may be had by appeal from * 568 the action of the court below.[3]

accounts, the spiritual court had exclusive jurisdiction; but there their authority ceases, and everything which they did afterwards was an excess of jurisdiction for which a prohibition ought to be granted.' These cases prove that the writ lies to prevent the exercise of any unauthorized power, in a cause or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction. The broad remedial nature of this writ is shown by the brief statement of a case by FITZHERBERT. In stating the various cases in which the writ will lie, he says; 'And if a man be sued in the spiritual court, and the judges there will not grant unto the defendant the copy of the libel, then he shall have a prohibition, directed unto them for a surcease,' etc., until they have delivered the copy of the libel, according to the statute made Anno 2 H. 5 F. N. B. title Prohibition. This shows that the writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of this remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed. I have no hesitation, therefore, in holding that this was a proper case for the use of the writ, if the supreme court was right in the conclusion to which it arrived at general term."

[1] State *v.* Lewis, 76 Mo. 370.

[2] State *v.* Ridgell, 2 Bailey, 560. Under the California code of procedure, it is held that prohibition will lie to a judge of an inferior court to prevent him from hearing a cause in which he is disqualified by personal interest from sitting, although the court of which he is a judge has jurisdiction of the cause. North Bloomfield G. M. Co. *v.* Keyser, 58 Cal. 315.

[3] State *v.* Nathan, 4 Rich. 513.

§ 782. The legitimate scope and purpose of the remedy being, as we have already seen, to keep inferior courts within the limits of their own jurisdiction, and to prevent them from encroaching upon other tribunals, it can not properly be extended to officers or tribunals whose functions are not strictly judicial.[1] And while there are cases where the writ has been granted against ministerial officers entrusted with the collection of taxes, yet the better doctrine, both upon principle and authority, undoubtedly is that it will not lie as against ministerial officers, such as collectors of taxes, or as against municipal boards of quasi-judicial functions, entrusted with taxing powers, to restrain them from levying or collecting taxes.[2] But where the power of appointment of certain

[1] See People v. Supervisors of Queens, 1 Hill, 195; Clayton v. Heidelberg, 17 Miss. 623; Greir v. Taylor, 4 McCord, 206; Board of Commissioners v. Spitler, 13 Ind. 235. But see, *contra*, People v. Works, 7 Wend. 486; State v. Commissioners of Roads, 1 Mills' Const. Rep. 55; Burger v. The State, 1 McMullan, 410. In State v. Commissioners of Roads, the doctrine is maintained that the writ may go to restrain the action of public functionaries entrusted with powers of a quasi-judicial nature, such as commissioners of roads, to prevent them from laying out a particular road.

[2] People v. Supervisors of Queens, 1 Hill, 195; Clayton v. Heidelberg, 17 Miss. 623. But see, *contra*, People v. Works, 7 Wend. 486; Burger v. The State, 1 McMullan, 410, in both of which cases prohibition was allowed to restrain the collection of taxes, although in Burger v. The State, the exercise of the jurisdiction for this purpose is conceded to be without the sanction of the English precedents. In People v. Supervisors of Queens, 1 Hill, 195, which was a motion for a prohibition, or other remedy, to prevent the levying of a tax, the court, BRONSON, J., say: "The only remaining branch of this case is the motion of the relator for a writ of prohibition to the town collector to stay the levying of the tax. A writ of prohibition does not lie to a ministerial officer to stay the execution of process in his hands. It is directed to a court in which some action or legal proceeding is pending, and to the party who prosecutes the suit, and commands the one not to hold, and the other not to follow, the plea. It stays both the court and the party from proceeding with the suit. The writ was framed for the purpose of keeping inferior courts within the limits of their own jurisdiction, without encroaching upon other tribunals. (2 Inst. 601; F. N. B. 94; Vin. Ab. tit. Prohibition; and same title in Com. Dig. Bac. Ab. 7th Lond ed. and Tomlin's Law Dict; 3 Bl Com. 111. See also Tomlin's Law Dict. tit.

commissioners to carry into effect a statute authorizing municipal subscriptions in aid of a railway, is vested * 569 in the judge of a subordinate court, and the act under which the power is conferred is unconstitutional, it has been held that a superior court might properly interfere by prohibition to prevent the appointment.[1] And the writ will lie, in the absence of other adequate remedy, to prevent unauthorized persons from usurping judicial power and from acting as a court without authority of law.[2]

§ 783. Prohibition will not lie against the governor of a state, to restrain him from granting a commission to a person claiming to be duly elected to a public office. The grounds on which the relief is refused in such a case are, that the judiciary have no power to invade the province of the executive, the three departments of government under our system being distinct and independent, and that prohibition is in no event a fit remedy to restrain the head of the executive department in the execution of his duties.[3] * 570 Nor will it lie against the chief executive officer of a city, such as a mayor, to prevent him from investigating charges against an inferior officer of the city subject to his control.[4]

§ 784. In all cases where the remedy by prohibition is provided by statute, but the statute fails to point out or pre-

Consultation, and F. N. B. 116.) Our statute also shows that the writ issues to a court and prosecuting party, not to a ministerial officer. (2 R. S. 587, §§ 61, 65.) In The People *v.* Works, 7 Wendell, 486, although the motion for a prohibition seems to have been granted, the remarks of the chief justice are in perfect harmony with what has been said in this opinion in relation to the proper office of the writ; and that case must not be understood as having decided anything more than that the tax then under consideration was illegal. There is not the slightest foundation in the books for saying that a prohibition may issue to a ministerial officer to stay the execution of process in his hands. If the relator has suffered, or is in danger of suffering an injury, he is mistaken in supposing that we can grant the relief which he asks. Motion denied."

[1] Sweet *v.* Hulbert, 51 Barb. 312.

[2] *Ex parte* Roundtree, 51 Ala. 42.

[3] Greir *v.* Taylor, 4 McCord, 206.

[4] Burch *v.* Hardwicke, 23 Grat. 51.

scribe the causes for which it may be allowed, reference must be had to the common law to determine whether an appropriate case is presented for the exercise of the jurisdiction. And since, at common law, the writ is only granted to restrain a court or parties therein from proceeding with a cause on the ground of a want of jurisdiction, it will not lie, unless expressly authorized by statute, to prevent a board of county officers from proceeding in a matter pending before them, of which they have original and exclusive jurisdiction.[1]

§ 785. The power of granting the writ of prohibition is, in many of the states of this country, conferred by constitutional or statutory provisions upon the courts of last resort as an original jurisdiction.[2] It is not, however, limited exclusively to these courts, and in some of the states the courts of general common-law jurisdiction, such as the various circuit or district courts throughout the state, issue the writ to courts inferior to them, to prevent the exercise of a jurisdiction properly pertaining to the higher tribunal.[3] But the writ only lies as between courts which sustain to each other the relation of superior and inferior, and when the court which it is sought to prohibit is in no manner subordinate or inferior to that in which the relief is sought, it will not be allowed.[4]

§ 785 *a*. In this country, the courts which are empowered to grant relief by prohibition are frequently fixed by constitutional provisions in the various states.[5] When the jurisdiction of the supreme court of a state is, under the constitution of the state, purely appellate, it has no power to grant a writ of prohibition, this not being the exercise of an

[1] Board of Commissioners *v.* Spitler, 13 Ind. 235.

[2] See as to the jurisdiction of the Supreme Court of South Carolina in prohibition, State *v.* Columbia, 16 S. C. 412, 17 S. C. 80.

[3] Howard *v.* Pierce, 38 Mo. 296; Reese *v.* Lawless, 4 Bibb, 394.

[4] Burch *v.* Hardwicke, 23 Grat. 51.

[5] See as to the jurisdiction of the courts in South Carolina, State *v.* County Treasurer, 4 Rich. N. S. 520. As to the power to issue the writ in vacation, see *Ex parte* Ray, 45 Ala. 15; *Ex parte* Boothe, 64 Ala. 312.

appellate jurisdiction, nor in aid or furtherance of such jurisdiction.[1] But under a constitution conferring upon the supreme court of the state power to issue any remedial writs necessary to give it a general supervision or control over inferior courts, it is held that the power to grant writs of prohibition rests with the supreme court, and not with an inferior court having no supervisory powers.[2] And when the supreme court of a state is vested, under the constitution, with power to issue writs of prohibition, the power granted is construed with reference to the writ as known at common law, and is confined to cases where the act which it is sought to prohibit is of a judicial nature. And under such a constitutional provision, a statute extending the remedy to acts which are either judicial or ministerial is held to be unconstitutional.[3]

§ 786. As regards the jurisdiction of the federal courts by this extraordinary remedy, it is held that the Supreme Court of the United States may grant the writ to restrain a district court from proceeding by libel against armed vessels of a belligerent power, at the suit of individual citizens to answer for captures and seizures made on the high seas, which have been brought for legal adjudication into the ports of the belligerent power.[4] But, while the Supreme Court is clearly empowered to issue a prohibition to a district court, which is proceeding in a case of admiralty and maritime cognizance of which it has no jurisdiction, the question of the jurisdiction of the district court must depend upon the facts set forth in the record upon which that court is called to act, and not upon facts dehors the record.[5] And in cases where an appeal lies to the Supreme Court, it has no power to issue a writ of prohibition until the appeal is

[1] Memphis *v.* Halsey, 12 Heisk. 210.

[2] Perry *v.* Shepherd, 78 N. C. 83.

[3] Camron *v.* Kenfield, 57 Cal. 550. See also Le Conte *v.* Trustees, 57 Cal. 269.

[4] United States *v.* Peters, 3 Dall 121.

[5] *Ex parte* Easton, 95 U. S. 68.

taken.[1] Nor will the writ lie from the Supreme Court in cases where it possesses no appellate power, as in criminal cases. And where a circuit court of the United States has convicted a person of a criminal offense, and has sentenced him to death, and the warrant for his execution is in * 571 the hands of the marshal, prohibition will not lie from the Supreme Court to prevent its execution. In such case, the circuit court has no further control over the warrant, and no power to recall it, and the duty of the marshal being purely ministerial, and the Supreme Court having no appellate jurisdiction over the action of the circuit court in the premises, no cause is presented which will warrant the granting of a prohibition.[2]

§ 787. It may be regarded as extremely doubtful whether any power exists in the circuit courts of the United States to issue writs of prohibition to the state courts. And it would seem upon principle to be clear, that if such jurisdiction exists by virtue of the fourteenth section of the judiciary act of 1789,[3] it is limited strictly to cases wherein the writ is necessary to the exercise of the jurisdiction of the circuit court. When, therefore, a person has been adjudicated a bankrupt in a district court of the United States, prohibition will not lie from a circuit court, to prevent the state courts from entertaining actions brought therein by the bankrupt against his partner in respect to the property of the bank-

[1] *Ex parte* Warmouth, 17 Wal. 64.

[2] *Ex parte* Gordon, 1 Black, 503.

[3] 1 U. S. Stat. 81. Section 14 of the act provides that "all the before-mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." This provision of the judiciary act of 1789 is substantially re-enacted in the Revised Statutes of the United States, § 716, as follows: "The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

rupt, and to prevent the state courts from interfering with the jurisdiction of the district court in bankruptcy. The use of the writ for such purposes is not necessary to the exercise of the jurisdiction of the circuit court, even though it has obtained control of the proceedings in bankruptcy by a petition for a review of the adjudication of the district court.[1]

§ 787 *a*. The authorities are conflicting upon the question whether prohibition will lie to restrain a state court from further proceedings in a cause, after the filing of a petition for the removal of the cause from a state to a federal court, under the act of congress governing such removals. In California, it is held that the writ may properly be granted in such case, to prohibit further proceedings in the state court, when the necessary steps have been taken to effect the removal.[2] The better doctrine, however, undoubtedly is, as held in Alabama, that the writ will not go under such circumstances, since the removal act provides a sufficient remedy by certiorari from the federal to the state court in such cases, and there being another adequate remedy, prohibition will not lie.[3]

§ 788. Although the granting or withholding of the writ is, as we have already seen, largely a matter of judicial discretion, yet the question of the jurisdiction of the subordinate court presented by the application must be decided by the superior and not by the inferior tribunal, it being the province of all superior courts of law to confine sub- * 572 ordinate tribunals within their proper bounds.[4] But the writ will not go, when the very question of fact on which it depends is denied, and is the chief point in the litigation yet pending and undetermined in the court below. Thus, when the jurisdiction of the inferior court depends upon the existence or non-existence of a certain judgment, and the

[1] *In re* Bininger, 7 Blatch. 159.

[2] Sheehy *v.* Holmes, 55 Cal. 485.

[3] *Ex parte* Mobile & Ohio R. Co. 63 Ala. 349.

[4] Gray *v.* Court of Magistrates, 3 McCord, 175.

question of fact as to whether such judgment was ever obtained is the issue presented in the court below, and the want of jurisdiction is not apparent on the face of the application, prohibition will not go, since if granted it would virtually be a trial of the case by the superior court upon its merits and before appeal.[1]

§ 789. Prohibition is the appropriate remedy, pending an appeal from an inferior to a superior court, to prevent the former from exceeding its jurisdiction by attempting to execute the judgment appealed from.[2] Thus, it lies to restrain the execution of an order of seizure and sale of property, under a judgment from which an appeal has been taken, which is still undetermined in the appellate court.[3] And when an inferior tribunal of a quasi-judicial nature, whose decision has been appealed to the court of last resort of the state and there reversed, still attempts to enforce its own judgment, regardless of the decision upon the appeal, an appropriate case is presented for the aid of a prohibition.[4]

§ 790. Where a court of general jurisdiction, as a circuit court of a state, has exceeded its powers by granting a writ of error and *supersedeas* to a county court, on the application of persons not parties to the judgment in the county court, and not affected thereby, prohibition is the proper remedy.[5] So the writ will go to prevent a court from proceeding to determine a contest as to the removal of a county seat, when it has no jurisdiction over such matter in the first instance.[6] But upon an application for a prohibition the inquiry is whether the court against which the writ is

[1] State *v.* Judge of Fourth Judicial District, 10 Rob. La. 169. See Succession of Whipple, 2 La. An. 236.

[2] State *v.* Judge of Fourth District Court, 21 La. An. 735; State *v.* Judge of Eighth District Court, 24 La. An. 598. As to the right to a prohibition to prevent proceedings in an action prematurely brought, pending an appeal, see State *v.* Judge of Third District Court, 31 La. An. 120.

[3] State *v.* Judge of Fourth District Court, 21 La. An. 735.

[4] Harriman *v.* County Commissioners, 53 Me. 83.

[5] Supervisors of Culpepper *v.* Gorrell, 20 Grat. 484.

[6] Russell *v.* Jacoway, 33 Ark. 191.

sought has jurisdiction of the matter in controversy; if it has jurisdiction no inquiry will be entertained concerning alleged errors or irregularities in its proceedings.[1] Nor will the writ be granted to prevent the enforcement of a judgment of an inferior court because of its refusal to * 573 receive legal evidence upon the trial of the cause.[2]

§ 791. Prohibition lies to prevent an inferior court from improperly interfering with or attempting to control the records and seal of a superior court, and to protect the superior tribunal in the possession and control of its own records. And where a subordinate court is endeavoring, by its writ of injunction, to exercise control over the books, records and seal of the superior or appellate tribunal, such proceeding is regarded as an unwarranted encroachment upon the jurisdiction of the higher court, which may be prevented by the writ of prohibition.[3]

§ 792. Where the writ is sought to restrain a court martial from proceeding with the trial of the relator upon certain charges and specifications preferred against him, and the application is made in the first instance, and before the court martial has proceeded to the consideration of any other question than that of its own jurisdiction, unless it is apparent upon the face of the proceedings that such court has no jurisdiction over any portion of the subject-matter of the charges preferred, prohibition will not issue.[4] Nor will it go to restrain the collection of fines imposed by a court martial under the militia laws of the state, where the persons and subject-matter were properly within the jurisdiction of such court.[5]

§ 793. The writ lies to prevent a probate court of a state from exercising jurisdiction over the estate of a deceased Indian, who had resided upon an Indian reservation within

[1] *Ex parte* Branch, 63 Ala. 383.

[2] State *ex rel.* Leonard, 3 Rich. 111.

[3] Thomas *v.* Mead, 36 Mo. 232.

[4] Washburn *v.* Phillips, 2 Metc. 296.

[5] State *v.* Edwards, 1 McMullan, 215.

the borders of the state, whose land retains its original character as a reservation, since the jurisdiction of the state for civil purposes does not attach over such lands, the Indian being regarded as a member of an independent nationality, over which the laws of the state have no force beyond the territorial limits of the state.[1]

§ 794. It was held at an early date by the court * 574 of kings bench, that a writ of error would not lie upon the refusal of a prohibition, it not being regarded as a final judgment between the parties.[2] In this country, the jurisdiction by prohibition is exercised in most of the states by courts of last resort, whose decisions are not subject to review. In New York, it is held that an order of the supreme court granting a writ of prohibition is appealable, since it determines the action in the inferior court by precluding any further proceedings therein, and thus deprives the plaintiff in such action of a legal right.[3] But since the granting of the writ rests in the discretion of the court, an order refusing to grant it is not appealable.[4]

[1] United States v. Shanks, 15 Minn. 369.

[2] Bishop of St. David v. Lucy, Ld. Raym. 539.

[3] People v. Justices of Marine Court, 81 N. Y. 500.

[4] People v. Westbrook, 89 N. Y. 152.

III. Practice and Procedure in Prohibition.

§ 795. Ancient common-law practice.
796. Modern common-law practice.
797. Of the declaration in prohibition.
798. The same.
799. Damages and costs.
800. Common-law procedure applicable in this country.
801. Statutory changes in procedure in England.
802. When declaration dispensed with.
803. Rule to show cause; affidavits required.
803 *a*. Demurrer for want of parties; demurrer carried back to first defect.
804. Implicit obedience required; violation punished by attachment for contempt.

§ 795. The ancient practice at common law, in granting prohibitions upon motion, seems to have been to first issue a rule to show cause why the prohibition should not go, second, to grant a rule *nisi*, and third, to make the rule absolute for the prohibition.[1] The respondent was at liberty to sue out a *scire facias* to show cause why a consultation should not be had of all the judges, and the *scire facias* recited the suggestion and also the prohibition issued thereon, to the damage of the party.[2] This practice, however, gradually fell into disuse, and in its place the court, on granting a prohibition, would bind the plaintiff or relator in a recognizance, to prosecute an attachment against the respondent for a supposed contempt * 575 in proceeding in the action below after prohibition granted, and would also require him to declare in prohibition.[3]

§ 796. In the absence of statutory regulations as to the pleadings and procedure in prohibition, the modern common-law practice is still applicable. According to that practice,

[1] 1 Keb. 281.
[2] Anon. 3 Salk. 289. And see Stadford *v.* Neale, Stra. 482.
[3] Anon. 3 Salk. 289.

the party aggrieved by the usurpation of jurisdiction in the court below applied to a superior court empowered to issue the writ, setting forth in a suggestion, petition or information the nature and cause of his complaint. If the facts relied upon as the foundation for the relief were not presented by the record of the inferior court, the relator was obliged to verify his suggestion by affidavit, and to set forth all the material facts on which he relied. The court thereupon granted a rule to show cause upon a given day why the writ should not issue. The effect of this rule, when served upon the subordinate court, was to stay all proceedings therein in the action prohibited, and upon return the court would make the rule absolute, or would discharge it as seemed proper. If the rule were made absolute, or if the court deemed the point involved too nice or doubtful to be decided upon motion, the relator was required to declare in prohibition, when the usual pleadings at common law followed, and the case might then be decided upon demurrer or plea to the merits. If, upon demurrer and argument, or after trial upon the merits, the matter suggested appeared to be sufficient ground for prohibition in point of law, judgment with nominal damages was rendered for the relator, and the court below was prohibited from any further proceeding. If, upon the other hand, no sufficient ground appeared for prohibiting the inferior court, judgment was rendered against the relator, and a writ of consultation was thereupon awarded, which, if granted upon the merits, was a perpetual bar to another prohibition upon the same suggestion. This was called a writ of consultation because, upon consultation had, the judges found the prohibition to be ill-founded, and they therefore returned the cause to its original jurisdiction, to be * 576 there determined, and directed the inferior court to proceed therein, the prohibition to the contrary notwithstanding.[1]

[1] *Ex parte* Williams, 4 Ark. 537; Bishop of Winchester's case, 1 Coke Rep. edition of 1826, p. 535, note; Croucher v. Collins, 1 Saund.

§ 797. In addition to the reasons above shown for requiring the plaintiff or relator to declare in prohibition, this practice was also resorted to when it was desired to submit the questions involved to a jury. For whatever purpose the declaration was required, it was regarded as the commencement of an action, which was, by a legal fiction, founded upon an attachment against the respondent for a supposed contempt of court, in proceeding with his action below after being served with a writ of prohibition. The object of this fictitious proceeding, was merely to try with greater certainty whether the inferior court ought to proceed with the action, and not whether it had actually proceeded, that allegation being merely formal and the contempt being purely a fiction. The respondent was not, in fact, served with any prohibition, the writ ordinarily having not yet issued, and therefore he had committed no contempt, this matter being merely alleged for form's sake, and to entitle the party to demand damages by giving the action the requisites of an ordinary suit at law.[1] This fiction seems to have been derived from the ancient practice in prohibition, since it is said that formerly the courts of common law would not grant the writ, unless the party were in contempt for proceeding after service of an original writ of prohibition out of chancery, and an *alias* and *pluries* directed to him. In that case, an attachment for prohibition issued against him, returnable in the superior courts of law, on which the party suing out the prohibition might declare to recover the damages which he had sustained, whence, it is supposed, the modern declaration had its origin.[2] The contempt alleged in the declaration being merely formal, no verdict was given upon that point.[3] * 577

136, note; 3 Black. Com. 113; Com. Dig. Prohibition, I. and K.

[1] Stadford *v.* Neale, Stra. 482; Croucher *v.* Collins, 1 Saund. 136, note; Bishop of Winchester's case, 1 Coke Rep. edition of 1826, p. 535, note; *Ex parte* Williams, 4 Ark. 537.

[2] Bishop of Winchester's case, note, 1 Coke Rep. edition of 1826, p. 535; Croucher *v.* Collins, note, 1 Saund. 136.

[3] Stadford *v.* Neale, Stra. 482; *Ex parte* Williams, 4 Ark. 537.

§ 798. The direction to declare being regarded as in favor of the respondent, he might afterwards submit and refuse the declaration, and the court would then stay proceedings upon his application.[1] But when the court was clearly satisfied that sufficient ground for a prohibition was shown, the respondent had a right to put the relator to declare, to the end that his jurisdiction might not be taken away from him in a summary manner, where no writ of error lay to redress the grievance. In cases where the matter involved was doubtful to the court, either upon questions of law or of fact, leave would be granted to declare in prohibition, in order that the questions at issue might be properly determined.[2] And where the court was inclined to grant the prohibition, the respondent was regarded as being entitled to put the relator to his declaration, almost as a matter of right, although the relator had no right to declare when the court was averse to granting the writ.[3]

§ 799. The declaration being to a considerable extent regarded as in the nature of an issue for the information of the court, upon a verdict for the relator or plaintiff on an issue joined thereon, only nominal damages were allowed. In case of judgment by default, the relator obtaining damages upon a writ of inquiry for the contempt in proceeding after prohibition was allowed costs from the time the rule was made absolute. If he obtained a verdict after plea pleaded, or after joinder in demurrer, he was allowed his costs from the time of the suggestion or original motion for the prohibition. Costs were also awarded against the respondent where he had insisted upon a declaration, and afterwards pleaded a frivolous plea, but by waiving his right to a declaration he might stay the proceedings without costs. If the relator was non-suited, or if he discontinued, or * 578 if a verdict went against him, the respondent was

[1] Gegge v. Jones, Stra. 1149.

[2] St. John's College v. Todington, Burr. 198.

[3] Bishop of Winchester's case, 1 Coke Rep. edition of 1826, p. 535, note.

entitled to costs, but not if he succeeded upon demurrer, such case not being provided for by the statutes regulating costs in prohibition.[1]

§ 800. Such, in brief, seems to have been the common-law method of procedure, when the aid of this extraordinary remedy was invoked to restrain the usurpations of inferior courts. Cumbrous and dilatory as it necessarily was, it yet aimed at the preservation of the rights of all parties concerned, and was specially designed for the two-fold purpose of guarding the rights of the party restrained, and of informing the superior court of all questions of law and of fact necessary to determine whether sufficient cause was presented for the exercise of its extraordinary jurisdiction. Unless otherwise regulated by statutes and codes of procedure, the common-law practice as here delineated is believed to be still applicable in this country, and it has been expressly recognized by the decisions in several of the states.[2]

[1] Bishop of Winchester's case, note, *supra*, and statutes there cited.

[2] See *Ex parte* Williams, 4 Ark. 537, for an exhaustive resumé of the common-law procedure upon writs of prohibition, as well as approved forms for the suggestion, declaration, plea, demurrer, pleas for consultation, judgment by default, writ of prohibition, and writ of consultation. See also for forms and precedents of the various pleadings in prohibition known to the common law, Bishop of Winchester's case, 1 Coke Rep. edition of 1826, p. 535; Croucher *v.* Collins, 1 Saund. 136; Dolby *v.* Remington, 9 Ad. & E. N. S. 179; Duke of Rutland *v.* Bagshaw, 14 Ad. & E. N. S. 869; 6 Wentworth's Pleadings, 242, *et seq.* The common-law procedure has been recognized and declarations in prohibition have been required in the following American cases: State *v.* Commissioners of Roads, 1 Mills' Const. Rep. 55; State *v.* Hudnal, 2 N. & M. 419; *Ex parte* Richardson, Harp. 308; M'Kenna *v.* Commissioners of Roads, Ib. 381; Johnson *v.* Basquere, 1 Spear, 329; Johnson *v.* Boon, Ib. 268; Warwick *v.* Mayo, 15 Grat. 528. In *Ex parte* Williams, 4 Ark. 537, the court, DICKINSON, J., after reviewing the common-law doctrine and mode of proceeding, say, p. 545: "As we have no statute upon the subject, the common law, with all its incidents, is of course, as far as applicable, in force here, and it only becomes necessary so to mould the remedy as to render it available under our system of jurisprudence, preserving as far as practicable all its common-law attributes. We understand, then, that a party wishing to avail himself of this writ in our courts must, if the facts are not presented by the record

§ 801. The more serious defects in the common-
* 579 law method of procedure on applications for prohibition were remedied in England by an act of parliament, 1 Geo. IV., enacted in 1831. This statute, after reciting that the filing of a suggestion of record, on applications for the writ, was productive of unnecessary expense, and that the allegation of contempt in the declaration was an unnecessary form, declares that it shall not be necessary to file a suggestion on any application for a writ of prohibition, and that the application may be made on affidavits only. It also provides that in case the party applying shall be directed to declare in prohibition, before the writ issues, his declaration shall be expressed to be in his behalf only, and not in behalf of himself and the crown, and that it shall set forth in a concise manner so much only of the proceedings in the court below as may be necessary to show the ground of the application, without alleging the delivery of a writ, or any contempt, and shall conclude by praying that a writ of prohibition may issue. To this declaration a demurrer may be interposed,

of the inferior court, make the proper suggestion to the inferior tribunal, setting forth all the material facts on which he relies, with the proper allegations, and if the facts do not appear on the record, verify the truth of them by affidavit. Upon the presentation of the suggestion, a rule should be entered upon the opposite party, requiring him to show cause upon a given day, in court, why the writ should not issue; which rule, when so entered, and served upon the inferior court and the party, shall stay all further proceedings in the case; and the court will then, in their discretion, make it absolute or discharge it, and if the former, direct the party to declare, without issuing the writ. If the defendant, upon the suggestion being presented, admits the facts, the rule will go and the writ issue. But if he insists upon a declaration, the case then takes its ordinary course and must be decided upon demurrer, or plea to the merits, and the writ be granted or the cause remanded to its original jurisdiction, to be there proceeded in and determined. As it is a *qui tam* action, under our statute a bond for costs must be filed before or upon the filing of the declaration, which is the commencement of the action." See also as to the practice in prohibition, South Carolina Society *v.* Gurney, 3 Rich. S. C. N. S. 51; Burch *v.* Hardwicke, 23 Grat. 51; Doughty *v.* Walker, 54 Ga. 595.

or such matters may be pleaded by way of traverse or otherwise, as may be necessary to show that the writ should not issue, concluding with a prayer that the writ may not issue. Judgment shall thereupon be given that the * 580 writ do or do not issue, and the party in whose favor judgment is given, whether on nonsuit, verdict, demurrer, or otherwise, is entitled to costs and judgment for the same. In case of verdict for the plaintiff in the declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given, but such assessment is not necessary to carry costs.[1]

§ 802. While the common-law procedure is still recognized and enforced in some of the states, and the writ will not ordinarily be granted in such states without first requiring the relator to declare in prohibition, if the opposite party insists upon a declaration, yet the reasons for requiring this course seem to be more especially applicable to cases of prohibition arising in courts of general jurisdiction, and not of last resort. And where the proceedings for the writ are instituted in the highest judicial tribunal of a state, as a part of its original jurisdiction, there seems to be less necessity for a declaration, and it may be dispensed with when the court is satisfied that the substantial merits of the controversy are fully presented by the petition and answer.[2]

§ 803. In no event should the writ be granted without first issuing a rule to show cause, in order that the respondent may be apprised of the proceeding and its object, and if it clearly appears to the satisfaction of the court that there is no ground for the writ, the rule to show cause will not issue.[3] Nor will the writ be granted to stay the proceedings

[1] 1 Geo. IV. Ch. xxi, 71 English Statutes at large, 104.

[2] Supervisors of Culpepper *v.* Gorrell, 20 Grat. 484.

[3] Mayo *v.* James, 12 Grat. 17; *Ex parte* Tucker, 25 Ark. 567. And see as to practice in granting the writ, South Carolina Society *v.* Gurney, 8 Rich. S. C. N. S. 51. If, however, the officer against whom the writ is sought is before the court upon due notice, and the entire record is before the court, and the matter has been fully argued

of a subordinate court upon a mere suggestion of its want of jurisdiction, without affidavits or record evidence of the fact, and when the matters relied upon in support of the application are not apparent upon the face of the proceedings, but are collateral and *dehors* the record, they should in all cases be verified by affidavit.[1] Upon the return to the rule to show cause the rule is made absolute, or is discharged, as may seem proper to the court.[2]

§ 803 *a*. A declaration in prohibition which shows that there are parties interested in the controversy, who are not made parties respondent to the proceeding, is demurrable upon that ground.[3] But when a motion is made to quash the return to an alternative writ of prohibition, upon the ground that the facts set forth in such return are insufficient, the motion operates as a demurrer to the return and will be carried back to the first defective pleading. And if, in such case, the relation or information does not show sufficient cause for issuing the writ, it will be quashed.[4]

§ 804. Implicit obedience to the mandate of the * 581 prohibition is exacted in all cases, it being a high prerogative writ and issued from a superior to an inferior jurisdiction. The appropriate process to punish a disobedience or unlawful interference with the writ is by attachment for contempt of court, to be enforced, if necessary, by fine and imprisonment.[5] And the courts are inclined to a liberal allowance of amendments to the attachment proceedings, such amendments being regarded as resting entirely within their discretion.[6] But while there may be doubt as to the propriety of a judge proceeding with a cause after he

upon the merits, it is unnecessary to award a rule *nisi* before granting the writ. *Ex parte* Lyon, 60 Ala. 650.

[1] Caton *v.* Burton, Cowp. 330; Buggin *v.* Bennett, Burr. 2037; *Ex parte* Williams, 4 Ark. 537.

[2] Mayo *v.* James, 12 Grat. 17.

[3] Armstrong *v.* County Court, 15 West Va. 190.

[4] State *v.* Braun, 31 Wis. 600.

[5] Howard *v.* Pierce, 38 Mo. 296; State *v.* Hungerford, 8 Wis. 345; 3 Black. Com. 112, 113; Com. Dig. Prohibition, I.

[6] State *v.* Hungerford, 8 Wis. 345

has been notified of an application for a writ of prohibition, such notice does not operate to stay proceedings. And the court may, therefore, properly decline to punish him for contempt for proceeding after such notice and before the writ is granted.[1]

[1] Henry v. Steele, 28 Ark. 455.

APPENDIX.

APPENDIX A.

STATUTE OF ANNE. (9 ANN. CH. 20, A. D. (1710.)

An act for rendering the proceedings upon writs of mandamus and informations in the nature of a quo warranto more speedy and effectual; and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs.

I. Whereas divers persons have of late illegally intruded themselves into, and have taken upon themselves to execute the offices of mayors, bailiffs, portreeves and other offices, within cities, towns corporate, boroughs and places, within that part of Great Britain called England and Wales; and where such offices were annual offices, it hath been found very difficult, if not impracticable, by the laws now in being, to bring to a trial and determination the right of such persons to the said offices within the compass of the year; and where such offices were not annual offices, it hath been found difficult to try and determine the right of such persons to such offices, before they have done divers acts in their said offices, prejudicial to the peace, order and good government within such cities, towns corporate, boroughs and places, wherein they have respectively acted; and whereas divers persons, who had a right to such offices, or to be burgesses or freemen of such cities, towns corporate, boroughs or places, have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted or restored to their said offices or franchises of being burgesses or freemen, than by writs of mandamus, the proceedings on which are very dilatory and expensive, whereby great mischiefs

have already ensued, and more are likely to ensue, if not timely prevented; for remedy whereof be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of Trinity term, in the year of our Lord one thousand seven hundred and eleven, where any writ of mandamus shall issue out of the court of queens bench, the courts of sessions of counties palatine, or out of any the courts of grand sessions in Wales, in any of the cases aforesaid, such person or persons, who by the laws of this realm are required to make a return to such writ of mandamus, shall make his or their return to the first writ of mandamus.

II. And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity term, as often as in any of the cases aforesaid, any writ of mandamus shall issue out of any of the said courts, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of mandamus, to plead to, or traverse all or any the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place as an issue joined in such action on the case should or might have been tried; and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his or their damages and costs in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum*, *fieri facias*, or *elegit;* and a peremptory writ of mandamus shall be granted without

delay, for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit to be levied in manner aforesaid.

III. Provided always, that if any damages shall be recovered by virtue of this act against any such person or persons making such return to such writ, as aforesaid, he or they shall not be liable to be sued in any other action or suit for the making such return; any law, usage, or custom to the contrary thereof in anywise notwithstanding.

IV. And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer in each of the said respective courts, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a quo warranto, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a quo warranto; and if it shall appear to the said respective courts, that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises, and such person or persons against whom such information or informations in the nature of a quo warranto shall be sued or prosecuted shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed, shall give further time to such person or

persons against whom such information shall be exhibited to plead; and such person or persons, who shall sue or prosecute such information or informations in the nature of a quo warranto shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary thereof in anywise notwithstanding.

V. And be it further enacted and declared by the authority aforesaid, that from and after the said first day of Trinity term, in case any person or persons against whom any information or informations in the nature of a quo warranto shall in any of the said cases be exhibited in any of the said courts, shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices, or franchises, it shall and may be lawful to and for the said courts respectively as well to give judgment of ouster against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said courts respectively to give judgment, that the relator or relators, in such inforformation named, shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they, for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators; such costs to be levied in manner aforesaid.

VI. And be it further enacted and declared by the authority aforesaid, that it shall and may be lawful to and for the said courts respectively, to allow to such person or persons respectively, to whom any writ of mandamus shall be directed, or against whom any information in the nature of a quo warranto, in any of the cases aforesaid, shall be sued or prosecuted, or to the person or persons who shall sue or prosecute the same, such convenient time respectively, to make a return, plead, reply, rejoin, or demur, as to the said courts respectively shall seem just and reasonable; anything herein contained to the contrary thereof in anywise notwithstanding.

VII. And be it further enacted by the authority aforesaid, that after the said first day of Trinity term, an act made in the fourth year of her majesty's reign, entitled, "An act for the amendment of the law, and the better advancement of justice and all the statutes of jeofayles, shall be extended to all writs of 'mandamus, and informations in nature of a quo warranto, and proceedings thereon, for any the matters in this act mentioned.'"

APPENDIX B.

STATUTE OF VICTORIA. (6 & 7 VICT. CH. 67, AUGUST 22, 1843.)

An Act to enable parties to sue out and prosecute writs of error in certain cases upon the proceeding on writs of mandamus.

I. Whereas writs of mandamus are issued by her majesty's court of queens bench and the courts of the counties palatine, and the application for the same must now be made in those courts respectively alone: And whereas writs of mandamus are frequently awarded, and often in cases of considerable importance, and the practice of issuing such writs hath of late very much increased: And whereas it is expedient that parties interested in the issuing of or in the proceedings upon such writs respectively, shall be enabled in certain cases to have the judgments and decisions of the said court of queens bench, and courts of the counties palatine respectively, in respect of the said writs and of the proceedings thereon, reviewed by a court of error, if they shall so think fit, and that a certain mode of effecting the same shall be ordained and established: And whereas by a certain act made and passed in the ninth year of the reign of Queen Anne, entitled "An act for rendering the proceedings upon writs of mandamus and informations in the nature of a quo warranto more speedy and effectual, and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs," it was enacted, amongst other things, that in certain cases therein mentioned, when a writ of mandamus should issue, and a return should be made thereunto, it should be lawful for the person suing or prosecuting such writ, to plead to or traverse all or any of the material facts contained within

the said return, to which the person making such return should reply, take issue, or demur, and such further proceedings in such manner should be had therein, for the determination thereof, as might have been had, if the person suing such writ had brought his action on the case for a false return: And whereas by an act passed in the first year of the reign of the late King William the Fourth, the said provision hereinbefore mentioned of the said herein first recited act was extended to writs of mandamus in all other cases, and to the proceedings thereon: And whereas in neither of the said recited acts, nor in any other act, is any power or authority given to the person prosecuting such writ of mandamus to demur to the return made to any such writ, so that the decision of the said courts respectively, as to the validity of such return, could be reviewed by a court of error; for remedy whereof, therefore: Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in all cases in which the person prosecuting any such writ heretofore issued, or hereafter to be issued, shall wish or intend to object to the validity of any return already made or hereafter to be made to the same, he shall do so by way of demurrer to the same, in such and the like manner as is now practised and used in the courts hereinbefore mentioned respectively in personal actions; and thereupon the said writ and return and the said demurrer shall be entered upon record in the said courts respectively, and such and the like further proceedings shall be thereupon had and taken, as upon a demurrer to pleadings in personal actions in the said courts respectively; and the said courts respectively shall thereupon adjudge, either that the said return is valid in law, or that it is not valid in law, or that the writ of mandamus is not valid in law; and if they adjudge that the said writ is valid in law, but that the return thereto is not valid in law, then and in every such case they shall also by their said judgment award that a peremptory mandamus shall issue in their behalf, and thereupon such peremptory writ of mandamus may be sued out and issued

accordingly, at any time after four days from the signing of the said judgment; and it shall be lawful for the said courts respectively, and they are hereby required, in and by their said judgment, to award costs to be paid to the party in whose favor they shall thereby decide by the other party or parties.

II. And be it enacted, that whenever any such judgment as is hereinbefore mentioned shall be given, or whenever issue in fact or in law shall be joined upon any pleadings in pursuance of the said recited acts or either of them, and judgment shall be given thereon by any of the courts aforesaid, it shall be lawful for any party to the record in any of such cases, who shall think himself aggrieved by such judgment, to sue out and prosecute a writ of error, for the purpose of reversing the same, in such manner and to such court or courts as a party to any personal action in the said court may now sue out and prosecute a writ of error upon the judgment in such action; and such and the like proceedings shall thereupon be had and taken, and such costs awarded, as in ordinary cases of writs of error upon judgments of the said courts respectively in personal actions; and if the judgment of such court be reversed by the court of error, the said court of error shall thereupon by their judgment not only reverse the same, but shall also in addition thereto give the same judgment, which the court whose judgment is so reversed ought to have given in that behalf; and if by their said judgment they shall award that a peremptory writ of mandamus shall issue, the same shall and may accordingly be issued by the proper officer in the office from which such writs issue, as the case may be, upon production to him of an office copy of the said judgment of the court of error, which shall be his authority and warrant for so doing: Provided always, that bail in error to the amount of fifty pounds, or such other sum as may by any rule of practice be appointed as hereinafter provided, shall be duly put in within four days after the allowance of the said writ of error, and the same shall afterwards be duly perfected, according to the practice of the court wherein the said original judgment was given, otherwise the plaintiff in error shall be deemed to

have abandoned his writ of error, and the same shall not be further prosecuted.

III. And be it enacted, that no action, suit, or any other proceeding shall be commenced or prosecuted against any person or persons whatsoever for or by reason of any thing done in obedience to any peremptory writ of mandamus, issued by any court having authority to issue writs of mandamus.

IV. And be it enacted, that the said courts of error, who are hereby empowered to take cognizance of the matters aforesaid, may make, and they are hereby directed to make, from time to time, and as often as they shall see occasion, such rules of practice in reference to the said application and the proceedings thereon, and in reference to the writs of error hereinbefore mentioned and the proceedings thereon, and the amount of bail to be taken, as the said courts respectively may deem necessary to effectuate the intention of this act in relation to the same respectively.

APPENDIX C.

COMMON LAW PROCEDURE ACT. (17 & 18 VICT. CH. 125, AUGUST 12, 1854.)

LXVIII. The plaintiff in any action in any of the superior courts, except replevin and ejectment, may endorse upon the writ and copy to be served, a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfill any duty in the fulfillment of which the plaintiff is personally interested.

LXIX. The declaration in such action shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains or may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected.

LXX. The pleadings and other proceedings in any action in which a writ of mandamus is claimed, shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages.

LXXI. In case judgment shall be given to the plaintiff that a mandamus do issue, it shall be lawful for the court, in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced.

LXXII. The writ need not recite the declaration or other proceedings or the matter therein stated, but shall simply command the performance of the duty, and in other respects

shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms.

LXXIII. The writ of mandamus so issued as aforesaid shall have the same force and effect as a peremptory writ of mandamus issued out of the court of queens bench, and in case of disobedience may be enforced by attachment.

LXXIV. The court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and upon the act being done, the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a master, as the court or a judge may order; and the court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

LXXV. Nothing herein contained shall take away the jurisdiction of the court of queens bench to grant writs of mandamus; nor shall any writ of mandamus issued out of that court be invalid by reason of the right of the prosecutor to proceed by action for mandamus under this act.

LXXVI. Upon application by motion for any writ of mandamus in the court of queens bench, the rule may in all cases be absolute in the first instance, if the court shall think fit, and the writ may bear teste on the day of its issuing and may be made returnable forthwith, whether in term or in vacation, but time may be allowed to return it, by the court or a judge, either with or without terms.

LXXVII. The provisions of "the common law procedure act of 1852," and of this act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by the court of queens bench.

APPENDIX D.

STATUTE OF GLOUCESTER. (6 Edw. I., Ch. 2, A. D. 1278.)

A Statute of Quo Warranto, made at Gloucester, *Anno* 6 Edw. I. Claiming and using of liberties, and causes to seize them into the king's hands. Complaint of officers.

I. The year of our Lord MCCLXXVIII., the sixth year of the reign of king Edward, at Gloucester, in the month of August, the king himself providing for the wealth of his realm, and the more full administration of justice, as to the office of a king belongeth (the more discreet men of the realm, as well of high as of low degree, being called thither,) it is provided and ordained, that whereas the realm of England, in divers cases, as well upon liberties as otherwise, wherein the law failed, to avoid the grievous damages and innumerable disherisons that the default of the law did bring in, had need of divers helps of new laws, and certain new provisions, these provisions, statutes, and ordinances underwritten shall from henceforth be straitly and inviolably observed of all the inhabitants of his realm. And whereas prelates, earls, barons, and other of our realm, that claim to have divers liberties, which to examine and judge, the king hath prefixed a day to such prelates, earls, barons, and others; it is provided and likewise agreed, that the said prelates, earls, barons, and others shall use such manner of liberties, after the form of the writ here following:

[II. Rex vic' salutem. Cum nuper in parliamento nostro apud westmonasterium, per nos & concilium nostrum provisum sit & proclamatum, quod prelati, comites, barones, & alii de regno nostro, qui diversas libertates per chartas progenitorum nostrorum regum angliæ habere clamant, ad

quas examinandas & judicandas diem praefixerimus in eodem parliamento, libertatibus illis taliter uterentur, quod nihil sibi per usurpationem seu occupationem accrescerent, nec aliquid super nos occuparent. Tibi precipimus, quod omnes illos de comitatu tuo libertatibus suis, quibus hujusque rationabiliter usi sunt, uti & gaudere permittas in forma praedicta, usque ad proximum adventum nostrum per comitatum praedictum, vel usque ad proximum adventum justiciariorum itinerantium ad omnia placita in comitatu, vel donec aliud inde praeceperimus: salvo semper jure nostro cum inde loqui voluerimus. Teste, etc.]

III. In like manner, and in the same form, writs shall be directed to sheriffs and other bailiffs for every demandant, and the form shall be changed after the diversity of the liberty which any man claimeth to have, in this wise:

[IV. Rex vic' salutem. Praecipimus tibi, quod per totam ballivam tuam videlicet, tam in civitatibus, quam in burgis, & aliis villis mercatoriis, & alibi, publice proclamari facias, quod omnes illi qui aliquas libertates per chartas progenitorum nostrorum regum angliae vel alio modo, habere clamant, sint coram justiciariis nostris ad primam assisam, cum in partes illas venerint, ad ostendendum quomodo hujusmodi libertates habere clamant, & quo warranto, & tu ipse sis ibidem personaliter una cum ballivis & ministris ad certificandum ipsas justiciarios super his & aliis negotiis illud tangentibus.]

V. This clause of liberties, that beginneth in this wise, Precipimus tibi, quod publice proclamari facias, etc., is put in the writ of common summons of the justices in eyre, and shall have a premonition by the space of forty days, as the common summons hath; so that if any party that claimeth to have a liberty, be before the king, he shall not be in default before any justices in their circuits; for the king of his special grace hath granted, that he will save that party harmless as concerning that ordinance. And if the same party be impleaded upon such manner of liberties before one or two of the foresaid justices, the same justices before whom the party is impleaded, shall save him harmless before the other justices, and so shall the king also before him, when it shall appear by the justices

that so it was in plea before them as is aforesaid. And if the foresaid party be afore the king, so that he can not be the same day afore the said justices in their circuits, the king shall save that party harmless before the foresaid justices in their circuits for the day, whereas he was before the king. And if he do not come in at the same day, then those liberties shall be taken into the king's hands in name of distress, by the sheriff of the place, so that they shall not use them until they come to answer before the justices; and when they do come in by distress, their liberties shall be replevised (if they demand them) in the which replevins they shall answer immediately after the form of the writ aforesaid; and if percase they will challenge, and say that they are not bounden to answer thereunto without an original writ, then if it may appear by any mean that they have usurped or occupied any liberties upon the king, or his predecessors, of their own head or presumption, they shall be commanded to answer incontinent without writ, and moreover they shall have such judgment as the court of our lord the king will award; and if they will say further that their ancestors died seized thereof, they shall be heard, and the truth shall be inquired incontinent, and according to that judgment shall be given; and if it appear that their ancestors died seized thereof, then the king shall award an original out of the chancery in this form: [Rex vic' salutem. Sum' per bonos summon' talem, quod sit coram nobis apud talem locum in proximo adventu nostro in com' praedict' vel coram justiciariis nostris ad proximam assisam, cum in partes illas venerint, ostensurus quo warranto tenet visum francipleg' in manerio suo de N. vel sic, quo warranto tenet hundredum de S. in com' praedict'; vel, quo warranto clamat habere thelonium pro se & haeredibus suis per totum regnum nostrum; & habeas ibi hoc breve. Teste, etc.] And if they come in at the same day, they shall answer, and replication and rejoinder shall be made; and if they do not come, nor be essoined before the king, and the king do tarry longer in the same shire, the sheriff shall be commanded to cause them to appear the fourth day; at which day, if they come not, and the king be in the same shire, such order shall be taken as in

the circuit of justices; and if the king depart from the same shire, they shall be adjourned unto short days, and shall have reasonable delays according to the discretion of the justices, as it is used in personal actions. Also the justices in eyre in their circuits shall do according to the foresaid ordinance, and according as such manner of pleas ought to be ordered in the circuit. Concerning complaints made and to be made of the king's bailiffs, and of other, it shall be done according to the ordinance made before thereupon, and according to the inquests taken thereupon heretofore; and the clause subscribed shall be put in a writ of common summons in the circuit of the justices assigned to common pleas directed to the sheriff, etc., and that shall be such: [Rex vic' salutem. Praecipimus tibi, quod publice proclamari facias, quod omnes conquerentes, seu conqueri volentes, tam de ministris & aliis ballivis nostris quibuscunque, quam de ministris & ballivis aliorum quorumcunque, & aliis, veniant coram justiciariis nostris ad primam assisam, ad quascunque querimonias suas ibidem ostendendas, & competentes emendas inde recipiendas secundum legem & consuetudinem regni nostri, & juxta ordinationem per nos inde factam, & juxta tenorem statutorum nostrorum, & juxta articulos iisdem justiciariis nostris inde traditos, prout praedicti justiciarii tibi scire faciant ex parte nostra. Teste meipso, etc., decimo die decembris, anno regni nostri, etc.]

APPENDIX E.

STATUTE DE QUO WARRANTO NOVUM. (18 Edw. I., St. 2, A. D. 1290.)

The Statute of Quo Warranto, made *Anno* 18 Edw. I., Stat. 2. and *Anno Dom.* 1290. How they shall hold their liberties which claim them by prescription or grant. A quo warranto shall be pleaded and determined before justices in eyre.

I. Forasmuch as writs of quo warranto, and also judgments given upon pleas of the same, were greatly delayed, because the justices in giving judgment were not certified of the king's pleasure therein; our lord, the king, at his parliament holden at Westminster, after the feast of Easter, the eighteenth year of his reign, of his special grace, and for the affection that he beareth unto his prelates, earls, and barons, and other of his realm, hath granted, that all under his allegiance, whatsoever they be, as well spiritual as other, which can verify by good enquest of the country, or otherwise, that they and their ancestors or predecessors have used any manner of liberties, whereof they were impleaded by the said writs, before the time of King Richard, our cousin, or in all his time, and have continued hitherto (so that they have not misused such liberties) that the parties shall be adjourned further unto a cer-day reasonable before the same justices, within the which they may go to our lord the king with the record of the justices, signed with their seal, and also return; and our lord the king, by his letters patents, shall confirm their estate. And they that can not prove the seisin of their ancestors or predecessors in such manner as is before declared, shall be ordered and judged after the law and custom of the realm;

and such as have the king's charter shall be judged according to their charters.

II. Moreover, the king of his special grace hath granted, that all judgments that are to be given in pleas of quo warranto, by his justices at Westminster, after the foresaid Easter, for our lord the king himself, if the parties grieved will come again before the king, he of his grace shall give them such remedy as before is mentioned. Also our said lord the king hath granted, for sparing of the costs and expenses of the people of his realm, that pleas of quo warranto from henceforth shall be pleaded and determined in the circuit of the justices, and that all pleas now depending shall be adjourned into their own shires, until the coming of the justices into those parts.

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